(2) Supreme Court, U.S.
FILED

No. 03- 031652 JUN 10 2004

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOHN DOE I, JANE DOE, and JOHN DOE II,

Petitioners,

v.

BILL TANDESKE, Commissioner of the State of Alaska Department of Public Safety and GREGG RENKES, Attorney General of the State of Alaska,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DARRYL L. THOMPSON
Counsel of Record
841 I Street
Anchorage, Alaska 99501
Ph: (907) 272-9322
Fax: (907) 277-1373

VERNE E. RUPRIGHT
Counsel for John Doe II
RUPRIGHT & FOSTER, LLC
322 Main Street
Wasilla, Alaska 99654
Ph: (907) 373-3215
Fax: (907) 373-3217

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Alaska's sex offender registration act, Alaska Stat. § 12.63.010 *et seq.*, requires persons long ago convicted, released and reintegrated to register with the authorities for life and to have personal and private information disseminated to the public. The private information disseminated to the public is not limited to private information belonging to the registrant, but included information belonging to members of the registrant's family. Does the Act, as applied to petitioners, violate the substantive component of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

1. The petitioners, John Doe I and John Doe II are pseudonymously named persons who were convicted of a sexual offense in the State of Alaska, and who have been unconditionally released and reintegrated into the community. Jane Doe (pseudonym) is the wife of John Doe I. She has never been convicted of a criminal offense.

2. Respondents are Bill Tandeske, who is the Commissioner of the State of Alaska Department of Public Safety and Gregg Renkes, who is the Attorney General of the State of Alaska. Mr. Tandeske and Mr. Renkes are charged with the duty of implementing and enforcing the Act challenged herein.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS AND ORDERS BELOW	1
RELATED OPINIONS	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	7
CONCLUSION	16
APPENDIX	
Court of Appeals Decision	1a
Alaska Statutes	5a
Alaska Regulations	27a

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Connecticut Department of Public Safety v. Doe, 538 U.S. 1 (2003) ..... *passim*

Hewitt v. Helms, 459 U.S. 460 (1983) 11

Lawrence v. Texas, 539 U.S. 558 (2003) 10, 11, 12, 15

Smith v. Doe, 538 U.S. 84 (2003) ..... *passim*

Washington v. Glucksberg, 521 U.S. 702 (1997) 7, 10, 12

Wolff v. McDonnell, 418 U.S. 539 (1974) 15

STATE CASES:

In re Welfare of T.K., 475 N.W.2d 88 (Minn. 1991) 12

STATE STATUTES:

Alaska Statute 11.51.100 ..... 2, 4

Alaska Statute 12.63.010 ..... 1, 3, 6

Alaska Statute 12.63.020 ..... 2, 3

Alaska Statute 18.65.087 ..... 4, 5

Alaska Statute 34.70.050 ..... 2, 4

Alaska Statute 47.10.011 ..... 2, 4

TABLE OF AUTHORITIES – Continued

Page

SECONDARY AUTHORITIES:

James Bonta, Tanya Rugge, Mia Dauvergne Solicitor General Canada The Reconviction Rate of Federal Offenders (6-2003) 14

Jerusalem: A framework for Post-Sentence Sex Offender Legislation, "Perspectives on Prevention, Registration, and the Public's 'Right' to Know;" 48 Vand. L. Rev. 219 (1995) 7

Langan, P. A., & Levin, D. J., Recidivism of sex offenders released in 1994; Bureau of Justice Statistics Special Report (November 2003) 14

Silva: Dial, 1-900-PERVERT, and Other Statutory Measures That Provide Public Notification of Sex Offenders, 48 SMU. L. Rev. 1962 (1995) 7

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1a) is reported at 361 F.3d 594.

RELATED OPINIONS

This Court's opinion remanding to the court of appeals is reported as *Smith v. Doe*, 538 U.S. 84 (2003). The court of appeals amended opinion that was reversed by *Smith v. Doe* is reported at 259 F.3d 979.

JURISDICTION

The court of appeals issued its decision on 17 March 2004. This Courts jurisdiction is invoked pursuant to *28 U.S.C. § 1254(1).*

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . "

The Alaska sex offender registration law, *Alaska Stat. §§ 12.63.010-12.63.100* and other pertinent provisions of the Alaska statutes and the Alaska Administrative Code are reproduced in the Appendix. (App. 5a).

STATEMENT OF THE CASE

In 1994, the Alaska Legislature enacted the Alaska Sex Offender Registration Act ("ASORA"), focusing on the purported need to infringe on the liberty of persons previously convicted of a sexual offense. (App. 5a, 1994 Alaska Sess. Laws, ch. 41, § 1). The ASORA specifically diminishes the right of privacy by stating it is "less important than the government's interest in public safety," and it infringes on those fundamental liberties protected by the 14th amendment, which are essential to the freedoms guaranteed by the Constitution of the United States. *Id.*

The ASORA compels the registrant to gather, collate and disclose information to the State so it may be included in a government information database labeling the registrant as dangerous persons to be avoided. *Alaska Stat. 11.51.100(a) (2) Alaska Stat. 47.10.011(7) Alaska Stat. 34.70.050.* In doing so, the ASORA creates a subclass of free citizens who have diminished liberty and privacy interests. (App. 9a, Alaska Stat. 12.63.020 (1998)).

The ASORA was intended as a means of supervising persons convicted of a sex offense and keeping a clearly definable group under the watchful eye of the State. (Minutes of Hearing Before House Judiciary Comm., 20th Alaska Legis., 1st Sess. (Jan. 27, 1997)). In fact, in amending the 1994 version of the ASORA, the legislature stated an intent to shorten the time between release from prison and registration so as to decrease the time sex offenders might be unsupervised. *Id.* This intent to keep persons previously convicted of a sex offense under supervision of the State is also clear from the face of the ASORA.

By threat of prosecution and imprisonment, the ASORA requires a person convicted of a sex offense to

gather, collate, verify, and deliver a variety of information about themselves and their crimes to the local state trooper post or police department. (App. 9a, Alaska Stat. 12.63.010(b) (1998)). While the State contends this information is already within the public domain, much of the information comes from sources protected through other state and federal laws such as State laws prohibiting access to motor vehicle records, and federal laws prohibiting access to medical and mental health records. Moreover, although the State claims the information is easily obtainable from its other information databases, it does not gather this information. Rather the ASORA compels the registrant's active participation by requiring the registrant to gather and collate the information on behalf of the State. *Id.* The ASORA even requires registrants to collect and release mental health records and provide information about identifying marks such as scars or tattoos. Upon delivery of the information, the individual must allow a photograph to be taken, and provide a set of fingerprints. *Id.* Once the initial registration is completed, registered persons are required to immediately report a change in their address, or a change in the motor vehicles they drive, or to which they have access or a change in their appearance. (App. 9a-11a, Alaska Stat. 12.63.010(c) (1998)). The Does are required to provide the same information four times per year for the rest of their lives, even if the information does not change. (App. 9a-13a, Alaska Stat. 12.63.010(d)(1), 12.63.020(a) (1998)).

The intent to keep registrants under the supervision of the State is also evidenced by the fact that, although the Does have had their civil rights restored and are no longer on State supervision, they are required by law to submit a DNA sample to the State upon demand. (App. 21a). No

warrant is required, and the State is not required to show probable cause for this search. *Id.* Thus, solely as a result of the ASORA and its provisions, the Does' fundamental and deeply rooted right to be free from warrantless search and seizure is infringed.[1]

Other provisions directly tied to the ASORA require disclosure of registration information during property transactions, and make it unlawful to leave a child in the care of a person required to register. *Alaska Stat. 11.51.100(a) (2) Alaska Stat. 47.10.011(7) Alaska Stat. 34.70.050.* Solely as a result of the ASORA, parental rights are infringed or terminated; rights which are fundamental and deeply rooted as one of the essential liberties protected by the 14th amendment.

By allowing unlimited public dissemination of personal information collected by registrants, registrants have lost housing, employment and suffered community condemnation, attacks and some have even been murdered. (App. 17a-18a, Alaska Stat. 18.65.087 (1998)). Moreover, a scarlet letter attaches when the State places a picture with a host of private information on the Internet with an inscription, "registered sex offender." http:// www.dps.state.ak.us/nSorcr/asp. Publishing registry information destroys the legal status of the previously convicted but a reintegrated free person by subjecting them to all sorts of burdens, costs, fees, loss of housing – loss of

[1] This statute is separately challenged in the U.S. District Court for the District of Alaska, however, it remains that DNA sample requirement is a direct result of the registration requirement.

employment – loss of public services – restrictions on interstate travel, and it infringes on the registrant's right to personal security. The registrants right to enjoyment of the community, like other community members, flows from the 14th Amendment, and it cannot be destroyed by the legislature upon any conception of the public welfare. The Constitution declares the principle upon which the public welfare is to be promoted, and opposing ones cannot be substituted without usurping the Constitution.

The ASORA contains no procedures through which one may escape its requirements, and no procedure is mandated or even available to determine the degree of risk posed by individual registrants before registration and periodic reporting is required or before information is released to the public. (App. 5a, 18a-19a). The information released to the public includes a photograph, name, home address, place of employment, crimes for which convicted, date and place of conviction, length of sentence, aliases, physical description, description of motor vehicles, license number of motor vehicles, vehicle identification numbers, and a description of scars and tattoos. (App. 18a-19a, Alaska Stat. 18.65.087(b) (1998)). All of this information has been gathered and delivered by the registrant, and some of the information produced by the registrant is protected by statute or privacy provisions. None of the information is gathered by the State. The description of motor vehicles is not limited to those owned by the registrant, but includes vehicles to which the registrant has access. *Id.* Under these onerous provisions, a registrant working as a clerk for a car rental company would presumably be required to list hundreds of vehicles belonging to his employer. *Id.* As applied, the ASORA places registrants under State supervision and they may be called to

the police station at the whim of the State or visited at home or work and required to answer questions or provide information. (App. 9a-10a, Alaska Stat. 12.63.010(d)(2) (1998)).

The effects of these laws on personal security and other fundamental rights, belonging to registrants and their families, that are deeply rooted in American tradition, are well documented. In a December 24, 2003 report from North Carolina a 22-year-old registered sex offender was fatally shot while entering his home.[2] In Kentucky, a December 6, 2003 report showed that police were investigating the murder of a 78-year-old registered sex offender who was murdered in his home.[3] In October 2003 a registered sex offender and his roommate were slain in Colville, Washington. Both were shot at close range with a shotgun.[4] Justin Fawcett was convicted of statutory rape when he had consensual sex with a fellow high school student. He had a promising career in the computer industry, but when he learned that he would be on the sex offender registration list for 25 years, he committed suicide.[5] The incidents of vigilantism, assaults, and murders of persons labeled as sex offenders by the State continue to mount and all are the result of public notification and the hysteria created by State officials in their zeal to support State registries.[6] The record in this case shows that wives

---

[2] http://www.charleston.net/stories/122403/loc_24shotdead.shtml

[3] http://www.wave3.com/Global/story.asp?S=1553800&nav=0RZFJWWz

[4] http://seattlepi.nwsource.com/local/aplocal_story.asp?category=6420&slug=WA%20Two%20Dead

[5] http://www.theoaklandpress.com/stories/042704/loc_20040427048.shtml

[6] *See* http://www.geocities.com/eadvocate/issues/harm-society.html

have lost employment, children have been harassed and families have been harmed solely because of the public disclosure and label placed on the registrant by the State.

Reams of evidence have been developed showing the effect these registration laws have on the registrant's personal security, right to work, right to association, right to travel, and other rights which are inexorably intertwined with the concept of liberty protected by the Constitution. *Jerusalem: A framework for Post-Sentence Sex Offender Legislation, "Perspectives on Prevention, Registration, and the Public's 'Right' to Know;"* 48 Vand. L. Rev. 219, 245-46 (1995). This retributive, stigmatizing community environment has the opposite effect of rehabilitative treatment, which is the second proposed policy goal of these registration laws. *Id.* Public notification laws have created an atmosphere where vigilantism, and public condemnation is the norm, rehabilitation is the exception. *Silva: Dial, 1-900-PERVERT, and Other Statutory Measures That Provide Public Notification of Sex Offenders*, 48 SMU. L. Rev. 1962, 1983-84 (1995). Under the guise of protecting the public, these laws have been the cause of homes being burned, *Id.*, at 1983; of beatings, and of families being run out of town. *Id.*, at 1983-1984. Even small children have been harassed merely because their parent was once convicted of crime. *Id.* p. 1984.

REASONS FOR GRANTING THE PETITION

On remand from this Court, the court of appeals concluded that under *Washington v. Glucksberg, 521 U.S. 702, 727 (1997),* it was forced to conclude that persons who have been convicted of serious sex offenses do not have a

fundamental right to be free from registration and notification requirements set forth in the ASORA. (App. 3a). The court of appeals also concluded that it was precluded from granting any relief in light of *Smith v. Doe*, 538 U.S. 84 (2003) and *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003). (App. 3a, 4a).

In *Smith v. Doe*, 538 U.S. 84 (2003), the Court held that retroactive application of the ASORA did not violate the Ex Post Facto Clause of the U.S. Constitution. In reversing the court of appeals, the Court observed the argument, that a personal registration system for supposedly free persons resembled "probation and supervised release in terms of the restraint . . . has some force." 123 S.Ct. at 1152. While the Court rejected the claim that the degree of restraint rose to the level of punishment prohibited by the Ex Post Facto Clause, the Court underscored that rejection by noting that the conclusion, that such a liberty restricting scheme did not amount to a criminal sentence is different from saying that it would pass muster under the Due Process Clause. *Id.*, at 1152. The Court also recognized that other claims were viable, but it restricted its focus to the Ex Post Facto question, which was the only question then before the Court. *Smith v. Doe*, 123 S.Ct. at 1153.

In *Connecticut Dep't of Public Safety v. Doe*, 123 S.Ct. 1160 (2003), the Court assumed, without deciding, that registrants possess a liberty interest in their reputation that would be affected by the State's alteration of their legal status through the registration obligations. The Court did not seek to define the parameters of this liberty because it held that the question had to be analyzed as a question of substantive rather than procedural due process. 123 S.Ct. at 1164-65.

In both *Smith v. Doe* and *Connecticut Dep't of Public Safety v. Doe*, the Court recognized that there was merit to the argument that these registration and community notification laws infringe on fundamental liberties. However, the Court noted that the determination as to whether fundamental liberties were infringed had to wait for another day because the question was not presented to the Court in either of those two cases. This petition now squarely presents the question that was absent in both the *Connecticut* and *Smith* cases because this petition calls upon the court to define the limits of personal autonomy of the individual, and to what extent that personal autonomy is protected by the substantive component of the Due Process Clause. In this petition, the Court is called upon to determine the importance of individual autonomy and whether it includes freedom from interference and governmental monitoring or supervision. This case also calls upon the Court to define "liberty" in the context of the right to the pursuit of happiness, and in the context of the right to return to society and be a productive citizen without State sponsored labeling with a scarlet letter. In answering the central question presented, the Court must decide whether the liberty protected by the Due Process Clause is infringed when a reintegrated, free citizen is subjected to overly burdensome State laws that forever keep that individual under the shadow of his crime, forever keep that individual under suspicion, view, reporting on demand, and which prohibits a person from changing his residence, his job, his vehicle, or his hair color without notifying the State.

Although the Court in *Smith v. Doe* and *Connecticut Dep't of Public Safety v. Doe* held that the questions presented here had to be analyzed as a question of substantive

due process, 123 S.Ct. at 1164-65 the court of appeals provided no analysis whatsoever in reaching its decision on remand. (App. 1a). Rather, the court of appeals erroneously concluded that it was bound by *Connecticut Dep't of Public Safety v. Doe* and *Smith v. Doe*, two cases where the question presented was never decided because the question was not before the Court.

The court of appeals also held it was bound by the Court's decision in *Washington v. Glucksberg*, but that case analyzed the guarantees of the Due Process Clause within the context of the right to die. In doing so, the Court focused on two primary aspects: the protection of our nation's objective fundamental, historically rooted, rights and liberties; and the cautious definition of what constitutes a due process liberty interest. The Court held that the right to assisted suicide is not a fundamental liberty interest protected by the Due Process Clause since its practice has been, and continues to be, offensive to our national traditions and practices. Moreover, employing a rationality test, the Court held that Washington's ban was rationally related to the state's legitimate interest in protecting medical ethics, shielding disabled and terminally ill people from prejudice which might encourage them to end their lives, and, above all, the preservation of human life.

In reaching its cursory decision, the court of appeal ignored *Lawrence v. Texas*, 539 U.S. 558 (2003), where the Court stated that, as part of constitutionally protected liberty, homosexuals have "the full right to engage in private conduct without government intervention." In *Lawrence* the majority decision found that the intimate, adult consensual conduct was part of the liberty protected by the substantive component of the Fourteenth Amendment's Due Process

Clause. *Lawrence* holds that liberty protects the person from unwarranted government intrusions.

The instant case asks whether liberty includes unwarranted governmental monitoring, which included invasions into the family, the right to work, the right to negotiate contracts such as leases and property transactions, and the right to travel. *Lawrence* holds that freedom extends beyond spatial bounds and liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case presents the question whether autonomy of the individual includes the right to be free after one has served his designated sentence and has been reintegrated into the community. Although *Lawrence* provided guidance with regard to the comprehensive analysis necessary to determine whether a particular provision offends the substantive component of the Due Process Clause, the court of appeals completely ignored *Lawrence* and chose to rely on two cases (*Connecticut Dep't of Public Safety v. Doe* and *Smith v. Doe*) where the specific question was neither presented nor answered, but where the Court held that the extent to which registration laws infringed on liberties had to be analyzed as a question of substantive due process.

This case presents another significant and important question. The Court has said that State granted liberty interests are protected by the procedural component of the Due Process Clause of the 14th Amendment. *Hewitt v. Helms*, 459 U.S. 460 (1983). Thus, the procedural component of the Due Process Clause protects liberties granted by State statute. The Court has also held that the 14th Amendment has a substantive component which protected rights that are deemed fundamental. *Lawrence*, *supra*.

The U.S. Constitution is not the exclusive donor of fundamental rights; rather, rights which are deemed fundamental may also flow from the rights granted in a State Constitution. *In re Welfare of T.K.*, 475 N.W.2d 88, 91 (Minn. 1991). The ASORA not only infringes upon rights which are deemed fundamental under the U.S. Constitution, it infringes on rights which are deemed fundamental under the Alaska Constitution. Nothing in the 14th Amendment limits application of the substantive component of the Due Process Clause to the protection of federally granted rights. Because the procedural component applies to State violation of State granted liberties, is it reasonable to conclude that the substantive component applies to protect fundamental liberties granted by a State Constitution? This petition presents that question.

Clearly the analysis given by the court of appeals to the important issues raised in this case is inconsistent with *Lawrence* and *Glucksberg*, both of which instruct that a careful, complete analysis of the liberties affected by the particular provision are required before deciding whether the particular provision before the Court offends Due Process. Moreover, the court of appeals reliance on *Connecticut Dep't of Public Safety v. Doe* and *Smith v. Doe* for the proposition that the question raised herein has already been decided was wrong because neither of those cases analyzed the issues in the context of a substantive due process question. The court of appeals made short shrift of the important questions before them, and failed to give the analysis necessary to determine first, whether any fundamental liberties were implicated by the ASORA, and second, whether the ASORA infringed on those fundamental liberties. (App. 1a). In fact, the court of appeals simply

ignored Jane Doe's claim that her federal right of privacy was infringed by the ASORA.

It is likely that the State, as previously, will inundate this Court with statistics about the threat posed by persons required to register in an attempt to convince this Court that the laws are justified because the public needs to be protected from the dire threat posed by persons required to register. Indeed, in both *Connecticut Dep't of Public Safety v. Doe* and *Smith v. Doe* the Court accepted, without examination, the statistics presented by the government. Statistics, however, are only as good as the methodology used to create them. Statistics are skewed by the prejudices of the individuals, or the monetary gain expected by the individuals who produced them. Analysis of the proffered statistics is important because "Recidivism," a seeming simple word meaning someone did it once and now again, is not that simple. Recidivism is actually defined by the person, researcher, state, industry, agency or other entity that uses the word in a particular study. While the essence of the definition is always retained (act done again), how that entity groups people to analyze recidivism, really defines recidivism for them. The police may take all people rearrested for crime and calculate a recidivism rate for rearrested persons and then they may take all people who are actually convicted again of the same crime for which they were previously convicted. Each of these methods will produce a different recidivism rate. This truth is illuminated by the most recent and most comprehensive studies since the Court decided *Connecticut Dep't of Public Safety v. Doe* and *Smith v. Doe*, which studies show that the recidivism statistics are not what the government previously represented, and which this Court adopted without analysis.

In a recent study in Canada, the reconviction rate for sex offenders who committed another sex offense was between 1 and 2 percent. *James Bonta, Tanya Rugge, Mia Dauvergne Solicitor General Canada The Reconviction Rate of Federal Offenders* (6-2003). In a recent comprehensive study released by the U.S. Department of Justice, Bureau of Justice Statistics, only 3.5% of those sex offenders released in 1994 were reconvicted for another sex crime. Langan, P. A., & Levin, D. J., *Recidivism of sex offenders released in 1994*; Bureau of Justice Statistics Special Report (November 2003). The latest 2003 statistics published by both the United States and Canadian governments, go to great lengths to explain how they have compiled their statistics, highly detailed, most likely because they realize there has been so much controversy and misconstruction of earlier published recidivism rates. The Canadian report mentioned this specifically.

This flexibility regarding the definition of recidivism, and the ability to skew or distort statistics compels the conclusion that the ability of a State to infringe upon the fundamental rights of individuals should not be justified based on statistics. To the extent the State argues otherwise, that should not form the basis for denying this petition.

Important rights are at issue in this case, which deserve careful analysis. The short shrift given to these issues by the court of appeal is inconsistent with decisions of this Court and many of the questions presented went unanswered. One such question was to what extent does the substantive component of the Due Process Clause protect fundamental rights guaranteed by a State Constitution. The Court has regularly held that state granted liberties are protected by the procedural component of the

14th amendment. *Wolff v. McDonnell*, 418 U.S. 539 (1974). It likewise follows that state granted fundamental rights are protected by the substantive component. Rather than decide these important questions, the court of appeals relied on its misinterpretation and misapplication of three decisions from this Court.

The court of appeals decision is inconsistent with decisions from this Court such as the decision in *Lawrence* because the question is not whether petitioners have a constitutional right to be free from registration and public notification. (App. 1a), *Lawrence*, *supra*. Rather, the question is whether in imposing that requirement does the statute infringe on fundamental liberties. The court of appeals obviously relied on the wrong legal standard in reaching its decision and thus, the court of appeals decision is inconsistent with decisions from this Court.

Finally, this Court has twice said that these registration laws should be analyzed under the substantive component of the Due Process Clause. Alaska's version of registration and public notification is one of the most sweeping in the nation, and petitioners know of no other cases working through the system that would present the opportunity for this Court to properly analyze these broad sweeping provisions as a question of substantive due process. *Connecticut Dep't of Public Safety v. Doe*, 123 S.Ct. at 1164-65. Accordingly,

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

DARRYL L. THOMPSON
Counsel of Record
DARRYL L. THOMPSON, P.C.
841 I Street
Anchorage, Alaska 99501
Ph: (907) 272-9322
Fax: (907) 277-1373

VERNE E. RUPRIGHT
Counsel for John Doe II
RUPRIGHT & FOSTER, LLC
322 Main Street
Wasilla, Alaska 99654
Ph: (907) 373-3215
Fax: (907) 373-3217

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE, I; JANE DOE; JOHN DOE II, *Plaintiffs-Appellants*, v. BILL TANDESKE; GREGG D. RENKES, *Defendants-Appellees*.	No. 99-35845 D.C. No. CV-94-00206-HRH OPINION

On Remand from the United States Supreme Court

Filed March 17, 2004

Before: Dorothy W. Nelson, Stephen Reinhardt, and Sidney R. Thomas, Circuit Judges.

COUNSEL

Darryl L. Thompson, Anchorage, Alaska, and Verne E. Rupright, Wasilla, Alaska, for the plaintiffs-appellants.

Kenneth M. Rosenstein, Assistant Attorney General, Anchorage, Alaska, for the defendants-appellees.

OPINION

PER CURIAM:

This is the second time this case has been before this court. *See Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001), *rev'd and remanded, Smith v. Doe*, 538 U.S. 84 (2003). The first time, we overturned the district court's grant of summary judgment to the State and held that Alaska's sex offender registration and notification statute, 1994 Alaska Sess.

Laws 41, violated the Ex Post Facto Clause as to plaintiffs who were convicted of crimes before the enactment of the statute. *Otte,* 259 F.3d at 979. Our resolution of the Does' ex post facto claim made it unnecessary for us to decide at that time whether the Act violated plaintiffs' procedural and substantive due process rights. *Id.* at 982. However, the subsequent reversal of *Doe v. Otte* by the Supreme Court in *Smith v. Doe* now requires us to address those claims. The facts and the discussion of the relevant statutory provisions are set forth in *Doe v. Otte,* and accordingly, we proceed directly to our analysis.

I

The Does assert that Alaska's sex offender registration law violates their right to procedural due process because the Act deprives them of protected liberty interests without notice or the right to be heard.

In *Connecticut Department of Public Safety v. Doe,* 538 U.S. 1 (2003), the companion case to *Smith,* the Supreme Court considered the respondent's claim that Connecticut's sex offender registry law, Conn. Gen. Stat. §§ 54-251, 54-252, 54-254 (2001), violated his right to procedural due process because he was not a "dangerous sexual offender," and the Connecticut law "'deprive[d] him of a liberty interest . . . without notice or a meaningful opportunity to be heard.'" *Id.* at 6. The Court held that, even assuming, *arguendo,* that the respondent had been deprived of a liberty interest, procedural due process "does not require the opportunity to prove a fact that is not material to the State's statutory scheme." *Id.* at 4. Because "the law's requirements turn on an offender's conviction alone – a fact that a convicted offender has already had a procedurally

safeguarded opportunity to contest," the Court reasoned, "any hearing on current dangerousness is a bootless exercise." *Id.* at 7-8. The Court concluded that "States are not barred by principles of 'procedural due process' from drawing such classifications." *Id.* at 8 (emphasis removed).

Like the Connecticut law, Alaska's sex offender statute bases the registration and notification requirements on the sole fact of plaintiffs' convictions. Accordingly, bound by *Connecticut Department of Public Safety,* we hold that Alaska's sex offender registration law does not deprive the Does of procedural due process.

II

The Does also contend that Alaska's sex offender registration and notification requirements violate their Fourteenth Amendment right to substantive due process by infringing their fundamental interests in life, liberty, and the property. Again, we are bound by controlling Supreme Court law.

The Court has described the "fundamental" rights protected by substantive due process as "those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment." *Washington v. Glucksberg,* 521 U.S. 702, 727 (1997). Under *Glucksberg,* we are forced to conclude that persons who have been convicted of serious sex offenses do not have a fundamental right to be free from the registration and notification requirements set forth in the Alaska statute.

While fundamental liberty interests require that any state infringement of these rights be "narrowly tailored to serve a compelling state interest," state actions that implicate anything less than a fundamental right require only that the government demonstrate "a *reasonable relation* to a legitimate state interest to justify the action." *Glucksberg,* 521 U.S. at 722 (emphasis added). As the Court has already determined in *Smith,* the statute's provisions serve "a legitimate nonpunitive purpose of 'public safety, which is advanced by alerting the public to the risk of sex offenders in their community.'" *Smith,* 538 U.S. at 102-03. Moreover, the Court held, the "broad categories" of offenses differentiated in the Act and the "corresponding length of the reporting requirement, are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." *Id.* at 102. Thus, although the Does possess liberty interests that are indeed important, *Smith* precludes our granting them relief.

Because we do not believe that *Glucksberg* and *Smith* permit us to reach any other result in this case, we conclude that the Alaska law does not violate the Does' rights to substantive due process.

III

For the foregoing reasons, we AFFIRM the district court's entry of summary judgment for the State.

STATUTES

1994 Alaska Session Laws ch. 41, § 1 provides:

The legislature finds that

(1) sex offenders pose a high risk of reoffending after release from custody;

(2) protecting the public from sex offenders is a primary governmental interest;

(3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public protection; and

(4) release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety.

1998 Alaska Session Laws ch. 106, § 25(a) & (c) provides:

APPLICABILITY. (a) A sex offender or child kidnapper with, before the effective date of this Act, (1) one conviction for an aggravated sex offense, (2) two or more convictions for a sex offense or child kidnapping, or (3) one conviction for a child kidnapping and one conviction for a sex offense, regardless of whether the offender or kidnapper has been unconditionally discharged from that conviction or convictions, shall register under AS 12.63.010, as amended by secs. 7 – 11 of this Act, by the 60th day after the effective date of this Act. A sex offender or child kidnapper with only one conviction for a sex offense that is not an aggravated sex offense or only one conviction for a child kidnapping, and who was unconditionally discharged from that

offense before July 1, 1984, does not have to register under this Act. A sex offender or child kidnapper with only one conviction for a sex offense that is not an aggravated sex offense or only one conviction for a child kidnapping who was required to register under sec. 12, ch. 41, SLA 1994, shall continue to register as provided by AS 12.63.010, as amended by secs. 7 – 11 of this Act.

1998 Alaska Session Laws ch. 81, § 22 provides:

APPLICABILITY OF SECTIONS 15 AND 16. (a) Except as otherwise provided in this subsection, a sex offender with only one conviction for a sex offense that is a violation of AS 11.41.460 or AS 11.61.127 who has been unconditionally discharged from that sex offense before July 1, 1984, is not required to register under or otherwise comply with AS 12.63. A sex offender who has been unconditionally discharged from a sex offense that is a violation of AS 11.41.460 or AS 11.61.127 on or after July 1, 1984, but before the effective date of this Act, shall register under and otherwise comply with AS 12.63 by July 1, 1998. A sex offender with two or more convictions for a sex offense or more than two convictions of AS 11.41.460 before a person under 16 years of age before the effective date of this Act, regardless of whether the sex offender was unconditionally released from the sex offenses before, on, or after July 1, 1984, who was not required to register under sec. 12, ch. 41, SLA 1994, shall register under and otherwise comply with AS 12.63 by July 1, 1998.

1998 Alaska Session Laws ch., 106, § 25, provides:

"APPLICABILITY. (a) A sex offender or child kidnapper with, before the effective date of this Act, (1) one conviction for an aggravated sex offense, (2) two or more convictions for a sex offense or child kidnapping, or (3) one conviction for a child kidnapping and one conviction for a sex offense, regardless of whether the offender or kidnapper has been unconditionally discharged from that conviction or convictions, shall register under AS 12.63.010, as amended by secs. 7 – 11 of this Act, by the 60th day after the effective date of this Act. A sex offender or child kidnapper with only one conviction for a sex offense that is not an aggravated sex offense or only one conviction for a child kidnapping, and who was unconditionally discharged from that offense before July 1, 1984, does not have to register under this Act. A sex offender or child kidnapper with only one conviction for a sex offense that is not an aggravated sex offense or only one conviction for a child kidnapping who was required to register under sec. 12, ch. 41, SLA 1994, shall continue to register as provided by AS 12.63.010, as amended by secs. 7 – 11 of this Act.

"(b) A conviction for a sex offense or child kidnapping before the effective date of this Act is a sex offense or child kidnapping for purposes of the duration of registration requirement of AS 12.63.020(a), as amended by sec. 12 of this Act.

"(c) In this section, "aggravated sex offense," "sex offender or child kidnapper," "sex offense," and "child kidnapping" have the meanings given in AS 12.63.100, as amended by secs. 14 – 16 of this Act."

Alaska Statute Sec. 11.56.835 provides:

Failure to register as a sex offender or child kidnapper in the first degree

(a) A person commits the crime of failure to register as a sex offender or child kidnapper in the first degree if the person violates AS 11.56.840

(1) and the person has been previously convicted of a crime under this section or AS 11.56.840 or a law or ordinance of this or another jurisdiction with elements similar to a crime under this section or AS 11.56.840; or

(2) with intent to escape detection or identification and, by escaping detection or identification, to facilitate the person's commission of a sex offense or child kidnapping.

(b) In a prosecution under (a)(2) of this section, the fact that the defendant, for a period of at least one year, failed to register as a sex offender or child kidnapper, failed to file the annual or quarterly written verification or changed the sex offender's or child kidnapper's address and did not file the required notice of change of address, is prima facie evidence that the defendant intended to escape detection or identification and, by escaping detection or identification, to facilitate the person's commission of a sex offense or child kidnapping.

(c) In this section, "child kidnapping" and "sex offense" have the meanings given in AS 12.63.100.

(d) Failure to register as a sex offender or child kidnapper in the first degree is a class C felony.

Alaska Statute Sec. 12.63.010 provides.

(a) A sex offender or child kidnapper who is physically present in the state shall register as provided in this section. The sex offender or child kidnapper shall register

(1) within the 30-day period before release from an in-state correctional facility;

(2) by the next working day following conviction for a sex offense or child kidnapping if the sex offender is not incarcerated at the time of conviction; or

(3) by the next working day of becoming physically present in the state.

(b) A sex offender or child kidnapper required to register under (a) of this section shall register with the Department of Corrections if the sex offender or child kidnapper is incarcerated or in person at the Alaska state trooper post or municipal police department located nearest to where the sex offender or child kidnapper resides at the time of registration. To fulfill the registration requirement, the sex offender or child kidnapper shall

(1) complete a registration form that includes, at a minimum,

(A) the sex offender's or child kidnapper's name, address, place of employment, date of birth;

(B) each conviction for a sex offense or child kidnapping for which the duty to register has not terminated under AS 12.63.020, date of sex offense or child kidnapping convictions, place and court of sex offense or child kidnapping convictions, whether the sex offender or child kidnapper has been unconditionally discharged from

the conviction for a sex offense or child kidnapping and the date of the unconditional discharge; if the sex offender or child kidnapper asserts that the offender or kidnapper has been unconditionally discharged, the offender or kidnapper shall supply proof of that discharge acceptable to the department;

(C) all aliases used;

(D) driver's license number;

(E) description, license numbers, and vehicle identification numbers of motor vehicles the sex offender or child kidnapper has access to regardless of whether that access is regular or not;

(F) any identifying features of the sex offender or child kidnapper;

(G) anticipated changes of address; and

(H) a statement concerning whether the offender or kidnapper has had treatment for a mental abnormality or personality disorder since the date of conviction for an offense requiring registration under this chapter;

(2) allow the Alaska state troopers, Department of Corrections, or municipal police to take a complete set of the sex offender's or child kidnapper's fingerprints and to take the sex offender's or child kidnapper's photograph.

(c) If a sex offender or child kidnapper changes residence after having registered under (a) of this section, the sex offender or child kidnapper shall provide written notice of the change by the next working day following the change to the Alaska state trooper post or municipal police

department located nearest to the new residence or, if the residence change is out of state, to the central registry.

(d) A sex offender or child kidnapper required to register

(1) for 15 years under (a) of this section and AS 12.63.020(a)(2) shall, annually, during the term of a duty to register under AS 12.63.020, on a date set by the department at the time of the sex offender's or child kidnapper's initial registration, provide written verification to the department, in the manner required by the department, of the sex offender's or child kidnapper's address and notice of any changes to the information previously provided under (b)(1) of this section;

(2) for life under (a) of this section and AS 12.63.020(a)(1) shall, not less than quarterly, on a date set by the department, provide written verification to the department, in the manner required by the department, of the sex offender's or child kidnapper's address and any changes to the information previously provided under (b)(1) of this section.

(e) The registration form required to be submitted under (b) of this section and the annual or quarterly verifications must be sworn to by the offender or kidnapper and contain an admonition that a false statement shall subject the offender or kidnapper to prosecution for perjury.

(f) In this section, "correctional facility" has the meaning given in AS 33.30.901.

Alaska Statute Sec. 12.63.020 provides.

(a) The duty of a sex offender or child kidnapper to comply with the requirements of AS 12.63.010 for each sex offense or child kidnapping

(1) continues for the lifetime of a sex offender or child kidnapper convicted of

(A) one aggravated sex offense; or

(B) two or more sex offenses, two or more child kidnappings, or one sex offense and one child kidnapping; for purposes of this section, a person convicted of indecent exposure before a person under 16 years of age under AS 11.41.460 more than two times has been convicted of two or more sex offenses;

(2) ends 15 years following the sex offender's or child kidnapper's unconditional discharge from a conviction for a single sex offense that is not an aggravated sex offense or for a single child kidnapping if the sex offender or child kidnapper has supplied proof that is acceptable to the department of the unconditional discharge; the registration period under this paragraph

(A) is tolled for each year that a sex offender or child kidnapper

(i) fails to comply with the requirements of this chapter;

(ii) is incarcerated for the offense or kidnapping for which the offender or kidnapper is required to register or for any other offense;

(B) may include the time a sex offender or child kidnapper was absent from this state if the sex offender or

child kidnapper has complied with any sex offender or child kidnapper registration requirements of the jurisdiction in which the offender or kidnapper was located and if the sex offender or child kidnapper provides the department with proof of the compliance while the sex offender or child kidnapper was absent from this state; and

(C) continues for a sex offender or child kidnapper who has not supplied proof acceptable to the department of the offender's or kidnapper's unconditional discharge for the sex offense or child kidnapping requiring registration.

(b) The department shall adopt, by regulation, procedures to notify a sex offender or child kidnapper who, on the registration form under AS 12.63.010, lists a conviction for a sex offense or child kidnapping that is a violation of a former law of this state or a law of another jurisdiction, of the duration of the offender's or kidnapper's duty under (a) of this section for that sex offense or child kidnapping. As a part of the regulations, the department shall require the offender or kidnapper to supply proof acceptable to the department of unconditional discharge and the date it occurred.

Alaska Statute Sec. 12.63.030 provides.

(a) If a sex offender or child kidnapper notifies the department that the sex offender or child kidnapper is moving from the state, the department shall notify the Federal Bureau of Investigation and the state where the sex offender or child kidnapper is moving of the sex offender's or child kidnapper's intended address.

(b) If a sex offender or child kidnapper fails to register or to verify the sex offender's or child kidnapper's address and registration under this chapter, or the department does not know the location of a sex offender or child kidnapper required to register under this chapter, the department shall immediately notify the Federal Bureau of Investigation.

Alaska Statute Sec. 12.63.100 provides:

In this chapter,

(1) "aggravated sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree; or

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under AS 11.41.410, 11.41.434, or a similar law of another jurisdiction;

(2) "child kidnapping" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit kidnapping;

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit kidnapping if the victim was under 18 years of age at the time of the offense; or

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under AS 11.41.300, or a similar law of another jurisdiction, if the victim was under 18 years of age at the time of the offense;

(3) "conviction" means that an adult, or a juvenile charged as an adult under AS 47.12 or a similar procedure in another jurisdiction, has entered a plea of guilty, guilty but mentally ill, or nolo contendere, or has been found guilty or guilty but mentally ill by a court or jury, of a sex offense or child kidnapping regardless of whether the judgment was set aside under AS 12.55.085 or a similar procedure in another jurisdiction or was the subject of a pardon or other executive clemency; "conviction" does not include a judgment that has been reversed or vacated by a court.

(4) "department" means the Department of Public Safety;

(5) "sex offender or child kidnapper" means a person convicted of a sex offense or child kidnapping in this state or another jurisdiction regardless of whether the conviction occurred before, after, or on January 1, 1999;

(6) "sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree;

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under the following statutes or a similar law of another jurisdiction:

(i) AS 11.41.410 – 11.41.438;

(ii) AS 11.41.440(a)(2);

(iii) AS 11.41.450 – 11.41.458;

(iv) AS 11.41.460 if the indecent exposure is before a person under 16 years of age and the offender has a previous conviction for that offense;

(v) AS 11.61.125 or 11.61.127;

(vi) AS 11.66.110 or 11.66.130(a)(2) if the person who was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense; or

(vii) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160, former AS 11.40.110, or former 11.40.200;

(7) "unconditional discharge" has the meaning given in AS 12.55.185.

Alaska Statute Sec. 18.65.087 provides:

(a) The Department of Public Safety shall maintain a central registry of sex offenders and child kidnappers and shall adopt regulations necessary to carry out the purposes of this section and AS 12.63. A post of the Alaska state troopers or a municipal police department that receives registration or change of address information under AS 12.63.010 shall forward the information within five working days of receipt to the central registry of sex offenders and child kidnappers. Unless the sex offender or child kidnapper provides proof satisfactory to the department that the sex offender or child kidnapper is not physically present in the state or that the time limits described in AS 12.63.010 have passed, the Department of Public Safety may enter and maintain in the registry information described in AS 12.63.010 about a sex offender or child kidnapper that the department obtains from

(1) the sex offender or child kidnapper under AS 12.63;

(2) a post of the Alaska state troopers or a municipal police department under this subsection;

(3) a court judgment under AS 12.55.148;

(4) the Department of Corrections under AS 33.30.012 or 33.30.035;

(5) the Federal Bureau of Investigation or another sex offender registration agency outside this state if the information indicates that a sex offender or child kidnapper is believed to be residing or planning to reside in the state or cannot be located;

(6) a criminal justice agency in the state or another jurisdiction;

(7) the department's central repository under AS 12.62; information entered in the registry from the repository is not subject to the requirements of AS 12.62.160(c)(3) or (4); or

(8) another reliable source as defined in regulations adopted by the department.

(b) information about a sex offender or child kidnapper that is contained in the central registry, including sets of fingerprints, is confidential and not subject to public disclosure except as to the sex offender's or child kidnapper's name, aliases, address, photograph, physical description, description of motor vehicles, license numbers of motor vehicles, and vehicle identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of

conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with requirements of AS 12.63 or cannot be located.

(c) Notwithstanding (b) of this section, if a sex offender has been convicted in this state or another jurisdiction of a sex offense identified as "incest," that offense may be disclosed under (b) of this section only as a "felony sexual abuse of a minor" conviction..

(d) The Department of Public Safety

(1) shall adopt regulations to

(A) allow a sex offender or child kidnapper to review sex offender or child kidnapper registration information that refers to that sex offender or child kidnapper, and if the sex offender or child kidnapper believes the information is inaccurate or incomplete, to request the department to correct the information; if the department finds the information is inaccurate or incomplete, the department shall correct or supplement the information;

(B) ensure the appropriate circulation to law enforcement agencies of information contained in the central registry;

(C) ensure the anonymity of members of the public who request information under this section;

(2) shall provide to the Department of Corrections and municipal police departments the forms and directions necessary to allow sex offenders and child kidnappers to comply with AS 12.63.010;

(3) may adopt regulations to establish fees to be charged for registration under AS 12.63.010 and for information requests; the fee for registration shall be based upon the actual costs of performing the registration and maintaining the central registry but may not be set at a level whereby registration is discouraged; the fee for an information request may not be greater than $10;

(4) shall remove from the central registry of sex offenders and child kidnappers under this section information about a sex offender or child kidnapper required to register under AS 12.63.020(a)(2) at the end of the sex offender's or child kidnapper's duty to register if the offender or kidnapper has not been convicted of another sex offense or child kidnapping and the offender or kidnapper has supplied proof of unconditional discharge acceptable to the department; in this paragraph, "sex offense" and "child kidnapping" have the meanings given in AS 12.63.100.

(e) The name, address, and other identifying information of a member of the public who makes an information request under this section is not a public record under AS 40.25.100 – 40.25.220.

(f) When a sex offender or child kidnapper registers under AS 12.63, the Department of Public Safety shall make reasonable attempts to verify that the sex offender or child kidnapper is residing at the registered address. Reasonable attempts at verifying an address include sending certified mail, return receipt requested, to the offender or kidnapper at the registered address. The department shall make reasonable efforts to locate an offender or kidnapper who cannot be located at the registered address.

(g) The department, at least quarterly, shall compile a list of those persons with a duty to register under AS 12.63.010 who have failed to register, whose addresses cannot be verified under (f) of this section, or who otherwise cannot be located. The department shall post this list on the Internet and request the public's assistance in locating these persons.

Alaska Statute Sec. 44.41.035 provides:

(a) To support criminal justice services in this state, the Department of Public Safety shall establish a deoxyribonucleic acid (DNA) identification registration system.

(b) The Department of Public Safety shall collect for inclusion into the DNA registration system a blood sample, oral sample, or both, from (1) a person convicted of a crime against a person or a felony under AS 11 or AS 28.35, (2) a minor 16 years of age or older, adjudicated as a delinquent for an act that would be a crime against a person or a felony under AS 11 or AS 28.35, if committed by an adult, (3) a voluntary donor, (4) an anonymous DNA donor for use in forensic validation, forensic protocol development, quality control, or population or statistical data bases, and (5) a person required to register as a sex offender or child kidnapper under AS 12.63. The department also may collect for inclusion into the DNA registration system a blood sample, oral sample, or tissue sample from crime scene evidence or from unidentified human remains. The DNA identification registration system consists of the blood, oral, or tissue samples drawn under this section, any DNA or other blood grouping tests done on those samples, and the identification data related to the samples or tests. Blood samples, oral samples, and tissue samples

not subject to testing under this section, and test or identification data related to those samples, may not be entered into, or made a part of, the DNA identification registration system.

(c) The Department of Public Safety may

(1) analyze DNA for law enforcement agencies; and

(2) assist law enforcement officials and prosecutors in the preparation and use of DNA evidence for presentation in court.

(d) Except as provided in (e) of this section, a local law enforcement agency may not establish or operate a DNA identification registration system unless

(1) the equipment and the DNA typing method of the local system are compatible with that of the state system under (a) of this section;

(2) the local system is equipped to receive and answer inquiries from the department's DNA identification registration system and transmit data to the department's DNA identification registration system; and

(3) procedure and rules for the collection, analysis, storage, expungement, and use of DNA identification data do not conflict with this section and procedures and rules applicable to the department's DNA identification registration system.

(e) Nothing in (d) of this section prohibits a local law enforcement agency from performing DNA identification analysis in individual cases to assist law enforcement officials and prosecutors in the preparation and use of DNA evidence for presentation in court.

(f) The DNA identification registration system is confidential, is not a public record under AS 40.25.110 – 40.25.140, and may be used only for

(1) providing DNA or other blood grouping tests for identification analysis;

(2) criminal investigations, prosecutions, and identification of human remains;

(3) statistical blind analysis;

(4) improving the operation of the system; or

(5) exoneration of the innocent.

(g) A person from whom a sample has been collected under this section may inspect and obtain a copy of the identification data regarding the person contained within the DNA identification registration system.

(h) The Department of Public Safety shall adopt reasonable procedures

(1) for the collection, analysis, storage, expungement, and use of the DNA identification registration system; and

(2) to protect the DNA identification registration system established under this section from unauthorized access and from accidental or deliberate damage by theft, sabotage, fire, flood, wind, or power failure.

(i) The Department of Public Safety shall, upon receipt of a court order, destroy the material in the system relating to a person. The court shall issue the order if it determines that

(1) the conviction or adjudication that subjected the person to having a sample taken under this section is reversed; and

(2) the person

(A) is not retried or readjudicated for the crime; or

(B) after retrial, is acquitted of the crime or after readjudication for the crime is not found to be a delinquent.

(j) The Department of Public Safety may adopt regulations to carry out the purposes of this section.

(k) The provisions of this section apply to a person from another state that this state has accepted under any interstate corrections or probation agreement or compact, regardless of whether the person is confined or released, if the person was convicted of an offense that is similar to an offense described in (b) of this section.

(l) The Department of Public Safety may not include in the DNA registration system a blood sample, oral sample, or tissue sample of the victim of a crime, unless that person would otherwise be included under (b)(1) – (5) of this section.

(m) The commissioner of public safety shall notify the president of the senate and the speaker of the house of representatives if, at any time after July 1, 2003, the federal government fails to pay the costs of the DNA identification registration system.

(n) In this section,

(1) "convicted" means that an adult, or a juvenile charged as an adult under AS 47.12 or a similar procedure in another jurisdiction, has entered a plea of guilty, guilty but mentally ill, or nolo contendere, or has been found guilty, or guilty but mentally ill, by a court or jury, regardless of whether the judgment was set aside under AS 12.55.085 or a similar procedure in another jurisdiction or was the subject of a pardon or other executive clemency; a person is not "convicted" if the judgment against the person was reversed or vacated by a court;

(2) "crime against a person" means an offense, or an attempt or solicitation to commit an offense, under AS 11.41;

(3) "oral sample" means a sample taken from the mouth of a person that consists of saliva or tissue, or both, as is determined by the Department of Public Safety to be necessary to obtain an accurate DNA identification and to otherwise achieve the purposes of this section.

HISTORY: (§ 2 ch 10 SLA 1995; am § 5 ch 44 SLA 2000; am § 1 ch 49 SLA 2001; am §§ 5 – 11, 14 ch 88 SLA 2003)

NOTES:
REVISOR'S NOTES. – In 2000, "AS 40.25.110 – 40.25.140" was substituted for "AS 09.25.110 – 09.25.140" to reflect the 2000 renumbering of AS 09.25.110 – 09.25.140.

Subsections (j) – (l), enacted as (k) – (m), were relettered in 2003, at which time § 14, ch. 88, SLA 2003, was codified as subsection (m), and former subsection (j) was relettered as subsection (n). Within subsection (n), paragraph (1) was added as paragraph (3) and renumbered in 2003 to alphabetize the terms.

CROSS REFERENCES. – For a statement of legislative purpose relating to the provisions of ch. 88, SLA 2003, that amend this section, see § 1, ch. 88, SLA 2003, in the 2003 Temporary and Special Acts. For transitional provisions applicable to development of regulations by the department under this section, see § 13, ch. 88, SLA 2003, in the 2003 Temporary and Special Acts.

EFFECT OF AMENDMENTS. – The 2000 amendment, effective May 12, 2000, in subsection (i) inserted ", upon receipt of a court order," and at the end of the introductory language added: "The court shall issue the order if it determines that."

The 2001 amendment, effective September 23, 2001, in subsection (b), added paragraph (2), redesignated former paragraph (2) as paragraph (3), and inserted ", a burglary, or a felony attempt to commit burglary," in paragraph (3).

The 2003 amendment, effective September 11, 2003, rewrote subsections (b) and (c); in subsection (f) rewrote paragraph (2), added paragraph (5), and made related stylistic changes; in subsection (n) added paragraph (1) and rewrote paragraph (2); added subsections (k) and (l); and, effective June 14, 2003, added subsection (j).

EFFECTIVE DATES. – Section 4, ch. 10, SLA 1995 makes this section effective January 1, 1996.

EDITOR'S NOTES. – Section 3, ch. 10, SLA 1995 provides that this section "applies to all convictions [for a crime against a person] occurring on or after January 1, 1996."

Section 2, ch. 49, SLA 2001, provides that the 2001 amendment of (b) of this section "applies to all convictions

and adjudications as a delinquent occurring on or after September 23, 2001."

Under § 12, ch. 88, SLA 2003, the changes made by ch. 88, SLA 2003, apply to all convictions or adjudications of delinquency included under (b) of this section, as amended by that Act, that occur on or after July 1, 2003, or that occurred before July 1, 2003, if the person is incarcerated or is under supervised probation or parole for the offense on or after July 1, 2003, and to all persons required to register as a sex offender or child kidnapper under AS 12.63 before, on, or after July 1, 2003.

ALASKA REGULATORY PROVISIONS

13 Ak. Admin. Code Sec. 09.025 provides:

(a) The department will approve or provide forms for an offender or a registration agency to submit registration information to the department, including

(1) initial registration information required under AS 12.63.010(b)(1);

(2) a photograph required under AS 12.63.010(b)(2);

(3) a set of fingerprints required under AS 12.63.010(b)(2);

(4) notice of change of address required under AS 12.63.010(c);

(5) annual or quarterly verification of registration information required under AS 12.63.010(d);

(6) proof of unconditional discharge date as provided in AS 12.63.020(a)(2)(A) and (C) and 12.63.020(b);

(7) proof of compliance with a sex offender registration program in a jurisdiction outside this state as provided in AS 12.63.020(a)(2)(B);

(8) proof that an offender is not physically present in this state as provided in AS 18.65.087(a);

(9) a request to review or have corrected information maintained in the registry about the offender as provided in AS 18.65.087(d);

(10) a request to appeal an adverse decision under (9) of this subsection.

(b) The department's forms will contain a notice that offenders who move out of this state must comply with registration requirements of their new locations.

(c) When an offender appears in person to submit information to a registration agency, the registration agency shall collect the information from the offender on a form approved or provided by the department. The registration agency shall review the completed form in the presence of the offender. If the form or any document submitted in connection with the form has obvious discrepancies, is incomplete, or is not legible, the registration agency may not accept the form until the offender makes all necessary corrections.

(d) When an offender submits a registration form to a registration agency without appearing in person, the registration agency shall review the form. If the form or any document submitted in connection with the form has obvious discrepancies, is incomplete, or is not legible, the registration agency will notify the offender of the need for corrections and may not accept the form until the offender makes all necessary corrections.

(e) If registration information is accepted by a registration agency, an offender is considered to have submitted the information on the date that

(1) it is delivered in person to a registration agency;

(2) it is postmarked, if mailed;

(3) delivery is documented according to written instructions on a registration form, if a method of delivery other than in-person or mail is approved by the department.

---

13 Ak. Admin. Code Sec. 09.030 provides:

(a) Within 90 days after an offender registers under this chapter, the department will mail the offender a registration verification form that includes, based on the most recent information the department has obtained about the offender under AS 18.65.087(a),

(1) a statement of the duration of the offender's duty to register;

(2) an explanation of the annual or quarterly schedule by which the offender must submit registration verification information to the department for the duration of the offender's duty to register;

(3) the name of the offender's registration agency.

(b) If five or more years have passed since the date of an offender's registration photograph or there is another reason to believe the offender's appearance has changed significantly, a registration agency may instruct the offender in writing

(1) to appear in person at the registration agency to allow a photograph to be taken; or

(2) if authorized in writing by the department, to submit a new photograph without appearing in person.

---

13 Ak. Admin. Code Sec. 09.040 provides:

(a) An offender shall, in complying with AS 12.63.010(c) and providing notice of change of residence, provide the offender's mailing address. The offender shall furnish the information on a form approved or provided by the department.

(b) For the purposes of AS 12.63.010, an offender is considered to have changed residence on the date that the offender leaves the residence without intending to return to continue living there, or the date that the offender has been away from the residence for 30 consecutive days, whichever occurs first.

---

13 Ak. Admin. Code Sec. 09.044 provides:

The department will, upon its verification for accuracy and completeness, consider an offender to have submitted satisfactory proof of unconditional discharge upon receipt of a

(1) department form that includes the name, mailing address, and phone number of a court or correctional official who may be contacted by the department to confirm the offender's assertion of the unconditional discharge date; and

(2) copy of a court judgment, court order, certificate of unconditional discharge, letter, or other document signed by an employee of a court or correctional agency showing, for the offense for which the offender is required to register,

(A) the unconditional discharge date;

(B) the full statute or ordinance citation and descriptive title;

(C) the court case number, and

(D) if assigned by the court, the charge or count number.

---

13 Ak. Admin. Code Sec. 09.046 provides:

For purposes of proving that an offender is not physically present in this state and that information about that person should be removed from the central registry established under AS 18.65.087(a), the department will, upon its verification for accuracy and completeness, consider the person to have submitted satisfactory proof when the person submits a department form that includes the signature of an official from

(1) a registration program in a jurisdiction outside this state verifying that the person is in compliance with the registration requirements of that program; or

(2) a government agency from a jurisdiction outside this state verifying that the person is physically present in that jurisdiction.

---

13 Ak. Admin. Code Sec. 09.050 provides:

(a) The department will provide information in the central registry that is subject to public disclosure under AS 18.65.087 for any purpose, to any person, without charge, by posting or otherwise making it available for public viewing in printed or electronic form.

(b) The department will charge a fee of $10 for each request to provide

(1) a printed copy, including a photograph if its is [sic] available, of registry information about one registrant who is specified by name; or

(2) a printed copy of the list of all registrants in a geographical area; in this paragraph, "geographical area" means

(A) a municipality or village;

(B) an area designated by a single postal ZIP code; or

(C) a street name within a specified municipality or village.

(c) If the department determines that it is in the public interest, the department will reduce or waive the fee described in (b) of this section.

---

13 Ak. Admin. Code Sec. 09.060 provides:

(a) Upon receiving a completed department form from a person asking the department to review or correct information maintained in the registry about that person, the department will respond in writing within 30 days. If

the request is denied, the department will state the reasons for the decision.

(b) An adverse response under (a) of this section may be appealed to the commissioner within 30 days after the person receives the response. The appeal must be in writing and must set out the reasons for the appeal. The commissioner will respond in writing within 45 days after receipt of the appeal.

(c) Repealed 11/3/99.

(d) Failure of the appropriate official to issue a response within the time limits described in (a) or (b) of this section is a denial of the request or appeal.

---

13 Ak. Admin. Code Sec. 09.900 provides:

(a) In this chapter and AS 12.63, unless the context requires otherwise, "Alaska state trooper post" means a permanent office of the department's division of Alaska state troopers or division of fish and wildlife protection.

(b) In this chapter, unless the context requires otherwise,

(1) "conviction" has the meaning given in AS 12.63.100;

(2) "days" means calendar days;

(3) "department" means the Department of Public Safety;

(4) "offender" means a person required to comply with registration requirements under AS 12.63; "offender" includes both a sex offender and a child kidnapper;

(5) "offense" means a conviction for which a person is required to register under AS 12.63;

(6) "registration agency" means

(A) for an offender who is incarcerated in a state correctional facility, the state correctional facility in which the offender is incarcerated;

(B) for an offender who is not incarcerated in a state correctional facility

(i) if the offender's residence address is in Anchorage, the department's permits and licensing unit in Anchorage;

(ii) if the offender's residence address is outside of Anchorage, the Alaska state trooper post or municipal police department nearest to the offender's residence address;

(7) "registration program" means a system of registration that qualifies for federal funding under 42 U.S.C. 14071 (Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act);

(8) "state correctional facility" has the meaning given in AS 33.30.901;

(9) "unconditional discharge" has the meaning given in AS 12.55.185.

(c) In AS 18.65.087, "another reliable source" includes, upon verification by the department, the following:

(1) a court of another jurisdiction;

(2) the victim of the offense or a member of the victim's family;

(3) an employer of the offender;

(4) an acquaintance or a neighbor of the offender;

(5) a member of the offender's family.

(3)

Supreme Court, U.S.
FILED
AUG 2 6 2004
OFFICE OF THE CLERK

No. 03-1652

IN THE

Supreme Court of the United States

JOHN DOE I, JANE DOE, AND JOHN DOE II,
Petitioners,

v.

BILL TANDESKE AND GREGG RENKES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

GREGG D. RENKES
Attorney General

KENNETH M. ROSENSTEIN *
Assistant Attorney General

STATE OF ALASKA
Department of Law
Office of Special Prosec. & Appeals
310 K Street, Suite 308
Anchorage, Alaska 99501
(907) 269-6250

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Petitioners, two convicted sex offenders and the wife of one of them, challenged the constitutionality of the Alaska Sex Offender Registration Act, Alaska Statute 12.63.010 *et seq.* and Alaska Statute 18.65.087, alleging in part that the Act violated their substantive due process rights under the Fourteenth Amendment. The question presented is:

Whether the Ninth Circuit, on remand from this Court, correctly determined that the registration and notification requirements of the Act did not violate the Fourteenth Amendment because it infringed none of the petitioners' fundamental rights and is reasonably related to the legitimate state interest of protecting the public from recidivist sex offenders.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL STATUTORY, AND ADMINISTRATIVE PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	11
CONCLUSION	24
APPENDICES	1a

TABLE OF AUTHORITIES

CASES Page

Abraham v. State, 585 P.2d 526 (Alaska 1978)..... 12
Artway v. Attorney General, 81 F.3d 1235 (3d Cir. 1996)..... 22
Connecticut Dep't of Public Safety v. Doe, 538 U.S. 1 (2003) 6, 13, 19, 24
Cutshall v. Sundquist, 193 F.3d 466 (6th Cir. 1999)..... 22
Doe v. City of Lafayette, 204 WL 1698309 (7th Cir., July 30, 2004)..... 22
Doe v. Otte, 259 F.3d 979 (9th Cir. 2001)..... 6, 7
Doe v. State, Department of Public Safety, 92 P.3d 398 (Alaska 2004) 20, 21
Doe v. Tandeske, 361 F.3d 594 (9th Cir. 2004)..... *passim*
Gundeson v. Hvass, 339 F.3d 639 (8th Cir. 2003)..... 22
Hemline v. State, 784 A.2d 1058 (Del. 2001)..... 22
In re J.A.W., 787 N.E.2d 747 (Ill. 2003) 23
In re J.R., 793 N.E.2d 687 (Ill. App. 2003)..... 23
In re W.M., 851 A.2d 431 (D.C. 2004)..... 22
Lambert v. California, 355 U.S. 225 (1957) 13
Lawrence v. Texas, 123 S.Ct. 2472 (2003)..... 18
McKune v. Lile, 536 U.S. 24 (2002)..... 3
Missouri v. Hunter, 459 U.S. 359 (1983)..... 19
Nebbia v. New York, 291 U.S. 502 (1934) 12
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)..... 13
Patterson v. State, 985 P.2d 1007 (Alaska App. 1999)..... 23
Paul P. v. Verniero, 170 F.3d 396 (3d Cir. 1999)... 14, 22
Paul v. Davis, 424 U.S. 693 (1976).....13, 19, 20
Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)..... 18

TABLE OF AUTHORITIES—Continued

Page

Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) 13
Reno v. Flores, 507 U.S. 292 (1993) 11, 12
Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997) 13
Smith v. Doe, 538 U.S. 84 (2003) ..... *passim*
State v. Druktenis, 86 P.3d 1050 (N.M. App. 2004) 23
State v. Williams, 728 N.E.2d 342 (Ohio 2000) 23
United States v. Harriss, 347 U.S. 612 (1954) 13
Washington v. Glucksberg, 521 U.S. 702 (1997) .. *passim*
Youakim v. Miller, 425 U.S. 231 (1976) 18

CONSTITUTIONS AND STATUTES

U.S. Const.
Amend. XIV 2
Due Process Clause 11, 12, 19
Alaska Const.
art I, § 12 ..... 2, 12
1994 Alaska Sess. Laws, ch. 41, § 1 ..... 3, 8
1998 Alaska Sess. Laws ch. 106, § 25 5
Alaska Stat. 11.41.434(b) (1983) 5
Alaska Stat. 11.51.100(a)(2) 8, 9
Alaska Stat. 11.56.835 3
Alaska Stat. 11.56.840 3
Alaska Stat. 11.81.250 5
Alaska Stat. 12.63.010(a) 3
Alaska Stat. 12.63.010(b) 3, 16, 17
Alaska Stat. 12.63.010(b)(1) 3
Alaska Stat. 12.63.010(b)(1)(H) 9
Alaska Stat. 12.63.010(b)(2) 3
Alaska Stat. 12.63.010(d) 16, 17
Alaska Stat. 12.63.010(d)(1) 4

TABLE OF AUTHORITIES—Continued

	Page
Alaska Stat. 12.63.010(d)(2)	4
Alaska Stat. 12.63.020(a)(1)	4
Alaska Stat. 12.63.020(a)(2)	4
Alaska Stat. 12.63.100(1)	4
Alaska Stat. 18.65.087(a)	4
Alaska Stat. 18.65.087(b)	4
Alaska Stat. 28.10.505	11
Alaska Stat. 34.70.050	8
Alaska Stat. 44.41.035(b)(5)	10
Alaska Stat. 47.10.011(7)	8
RULES	
Supreme Court Rule 10	21, 24
Supreme Court Rule 10(a)	22
Supreme Court Rule 15.2	7
ADMINISTRATIVE REGULATIONS	
13 Alaska Admin. Code 09.025(d)	16, 17
13 Alaska Admin. Code 09.025(e)	16, 17
13 Alaska Admin. Code 09.030(b)	16
MISCELLANEOUS	
Alaska Dep't of Public Safety, *Sex Offender Registration Central Registry*	4, 17
Alaska Dep't of Public Safety, *Sex Offender/ Child Kidnapper Registration Form*	9, 10, 11
Hearing on HB 69 Before House Judiciary Comm., 18th Alaska Legis., 1st Sess. (February 10, 1993)	2
Hearing on HB 69 Before Senate Finance Comm., 18th Alaska Legis., 1st Sess. (April 28, 1993)	2

IN THE

Supreme Court of the United States

No. 03-1652

JOHN DOE I, JANE DOE, AND JOHN DOE II,
Petitioners,

v.

BILL TANDESKE AND GREGG RENKES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals [Pet. App. 1a] is reported at 361 F.3d 594. The decisions of the district court [Resp. App. 1a, 42a] are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2004. The petition for a writ of certiorari was filed on June 10, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND ADMINISTRATIVE PROVISIONS INVOLVED

Amendment XIV, section 1 of the United States Constitution provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"

Article I, section 12 of the Alaska Constitution provides in part:

> Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation.

The relevant statutes, rules, and administrative regulations involved are set forth in the appendix to the petition and in the appendix to this brief. [Pet. App. 5a ff.; Resp. App. 47a ff.]

STATEMENT OF THE CASE

Statutory Background. By 1993 Alaska had the unfortunate distinction of having the nation's highest rate of child sexual abuse, six times the national average; its rate of sexual assault, the second highest in the nation, had nearly doubled in the preceding two years.[1] Based on these exploding rates and on the high risk of recidivism among convicted sex offenders, Alaska's legislature responded to this crisis by enacting in 1994 the Alaska Sex Offender Registration Act

---

[1] *See Hearing on HB 69 Before House Judiciary Comm.* at 612, 18th Alaska Legis., 1st Sess. (February 10, 1993) (available at http://www.legis.state.ak.us/basis/get_single_minute.asp?session=18&beg_line=0392&end_line=0954&time=1300&date=19930210&comm=JUD&house=H (visited August 10, 2004)); *Hearing on HB 69 Before Senate Finance Comm.*, 18th Alaska Legis., 1st Sess. (April 28, 1993) (available at http://www.legis.state.ak.us/basis/get_single_minute.asp?session=18&beg_line=0089&end_line=0219&time=1455&date=19930428&comm FIN&house=S (visited August 10, 2004)).

(Act), Alaska Statute 12.63.010 *et seq.* and Alaska Statute 18.65.087 (1994). *See* 1994 Alaska Sess. Laws, ch. 41, § 1. [Pet. App. 5a] *See also McKune v. Lile,* 536 U.S. 24, 32-34 (2002) (sex offenders present "serious threat in this Nation"; risk of recidivism by sex offenders is "frightening and high").

As enacted and amended the Act comprises two components. First, the Act requires registration of convicted sex offenders and child kidnappers. Second, the Act creates a central registry through which information about registered offenders is made available to the public. (These components, summarized here, are described in more detail in *Smith v. Doe,* 538 U.S. 84, 90-91 (2003).)

The registration component requires sex offenders or child kidnappers physically present in Alaska to register with either the Alaska Department of Corrections or a law enforcement agency. Alaska Stat. 12.63.010(a), (b). [Pet. App. 9a-10a] The offender does this by completing a form, providing his or her name, date of birth, address and any anticipated change of address, place of employment, information about each sex offense or child kidnapping conviction, any aliases used, any identifying physical features, driver's license number, description of vehicles he or she has access to, and a statement indicating whether he or she has had any postconviction mental health treatment. Alaska Stat. 12.63.010(b)(1). [Pet. App. 9a-10a] In addition, each offender registering for the first time is photographed and fingerprinted. Alaska Stat. 12.63.010(b)(2). [Pet. App. 10a] Criminal sanctions are imposed for knowingly failing to register as required under the Act. Alaska Stat. 11.56.835, 11.56.840. [Pet. App. 8a; Resp. App. 48a]

An offender convicted of a single, nonaggravated sex offense or child kidnapping must register for 15 years after unconditional discharge from his sentence and verify the registration information annually in writing. Alaska Stat.

12.63.010(d)(1), 12.63.020(a)(2). [Pet. App. 11a-13a] An offender convicted of an aggravated sex offense or more than one sex offense or child kidnapping must register for life and submit quarterly verification. Alaska Stat. 12.63.010(d)(2), 12.63.020(a)(1). [Pet. App. 11a-12a]

The information provided by sex offenders is managed by the Alaska Department of Public Safety and maintained in a central registry of sex offenders. Alaska Stat. 18.65.087(a). [Pet. App. 17a-18a] An offender's fingerprints, driver's license number, anticipated change of address, and disclosures of mental health treatment are kept confidential. Alaska Stat. 18.65.087(b). [Pet. App. 18a-19a] The remaining information may be made available to the public. *Id.* The Act does not specify how this information should be made available. Alaska has chosen to use the Internet. *See* Alaska Dep't of Public Safety, *Sex Offender Registration Central Registry* (http://www.dps.state.ak.us/nSorcr/asp/) (visited August 10, 2004). (Information about an offender's vehicles is not included in listings on the website. *Id.*)

Facts. Petitioner John Doe I was convicted of first-degree sexual abuse of a minor, an aggravated sex offense which requires sexual penetration of the victim, and second-degree sexual abuse of a minor. He pled no contest and was sentenced to 12 years' imprisonment with 4 years suspended. He was released from prison in December 1990. He married petitioner Jane Doe, who is not a convicted sex offender, after his release.

Petitioner John Doe II was also convicted of first-degree sexual abuse of a minor. He pled no contest and was sentenced to eight years' imprisonment. He was released from prison in May 1990.

Both John Doe I and John Doe II are required to register as sex offenders because they were convicted of aggravated sex offenses, as defined in Alaska Statute 12.63.100(1) and had

not been unconditionally discharged from their convictions before July 1, 1984. 1998 Alaska Sess. Laws ch. 106, § 25. [Pet. App. 7a, 14a-13a]. They are subject to lifetime registration and quarterly verification.

Proceedings below and in this Court. Before the Act became effective, petitioners challenged it in federal court under 28 U.S.C. 1983. Petitioners asserted that the Act violates the Due Process Clause and their right to privacy. They also claimed the Act violated the Ex Post Facto Clause. But petitioners did not raise a substantive due process claim in their district court pleading. They alleged in their amended complaint that the Act would (1) subject them to ridicule, interfere with their rights to work, to travel within the State of Alaska, to live peaceably, and to privacy; (2) violate procedural due process by infringing a liberty interest arising under the Alaska Constitution's article I, section 12, governing penal administration; and (3) violate procedural due process by subjecting them to registration without providing them an opportunity to show they were no longer dangerous. The district court granted summary judgment in favor of respondents, ruling that the Act did not violate the Ex Post Facto Clause or the petitioners' procedural due process or privacy rights. [Resp. App. 18a-19a, 26a]

Petitioners appealed. In addition to their ex post facto claim they initially argued that the Act arbitrarily failed to distinguish the relative seriousness of sexual offenses[2] and violated their (1) liberty interest arising from their right to privacy under the Alaska Constitution, (2) freedom from constant suspicion, and (3) rights to rehabilitation (under the Alaska Constitution), to personal safety, to travel, and to

---

[2] Both John Does ignore that they were convicted of first-degree sexual abuse of a minor, an unclassified felony, a designation reserved for the most serious criminal offenses. *See* Alaska Stat. 11.41.434(b) (1983), 11.81.250. [Resp. App. 47a, 49a]

employment. The Ninth Circuit reversed, addressing only the petitioners' ex post facto claim, and did not reach their due process claims. *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001).

This Court granted respondents' petition for a writ of certiorari. *Otte v. Doe*, 534 U.S. 1126 (2002). The Court ultimately reversed the Ninth Circuit's decision, holding that the Act "is nonpunitive and its retroactive application does not violate the *Ex Post Facto* Clause." *Smith v. Doe*, 538 U.S. 84, 105-06 (2003). The Court remanded the case to the Ninth Circuit for consideration of the unresolved due process issues. *Id.* at 106.

In their supplemental brief filed in the Ninth Circuit after the remand, petitioners expanded their claim to include alleged invasions of their rights (1) to autonomy from government monitoring, (2) to privacy from hyperpublic exposure, (3) to be free from government-imposed stigma, and (4) to be left alone. They further claimed that each of these rights was fundamental under the federal constitution. The Ninth Circuit rejected petitioners' due process claims. *Doe v. Tandeske*, 361 F.3d 594 (9th Cir. 2004) (per curiam).

The Ninth Circuit first addressed petitioners' claim that requiring them to register violates their right to procedural due process by "depriv[ing] them of protected liberty interests without notice or the right to be heard." *Tandeske*, 361 F.3d at 596. The court rejected this claim based on this Court's decision in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 7-8 (2003) (procedural due process satisfied when duty to register turns solely on whether person has sex offense conviction), *quoted in Tandeske*, 361 F.3d at 596.

The Ninth Circuit also rejected petitioners' claim that the Act violated their right to substantive due process, which protects only "those personal activities and decisions that this Court has identified as so fundamental to our concept of constitutionally ordered liberty, that they are protected by the

Fourteenth Amendment." *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997), *quoted in Tandeske*, 361 F.3d at 596. The court concluded that persons "convicted of serious sex offenses do not have a fundamental right to be free from the registration and notification requirements set forth in the Alaska statute." *Id.* at 597.

Finding no infringement of fundamental rights, the Ninth Circuit held that state action survives substantive due process scrutiny if the government demonstrates a "'*reasonable relation* to a legitimate state interest to justify the action.'" *Tandeske*, 361 F.3d at 597 (emphasis by the court) (quoting *Glucksberg*, 521 U.S. at 722). The court concluded that the Act satisfied that test based upon the determination in *Smith* that the Act serves a "legitimate nonpunitive purpose of 'public safety, which is advanced by alerting the public to the risk of sex offenders in their community.'" *Smith*, 538 U.S. at 102-03 (quoting *Doe v. Otte*, 259 F.3d at 991), *quoted in Tandeske*, 361 F.3d at 597. The Act's "broad categories" of sex offenses, differentiating between aggravated and nonaggravated offenses, and the corresponding duration of the registration requirement "are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." *Smith*, 538 U.S. at 102, *quoted in Tandeske*, 361 F.3d at 597. Consequently, "Alaska law does not violate the Does' rights to substantive due process." *Tandeske*, 361 F.3d at 597.

Misstatements in petitioners' statement of the case. The respondents are compelled to address the numerous misstatements made in the petitioners' statement of the case. *See* Sup. Ct. Rule 15.2 (admonishing opposing counsel to point out any misstatements of fact or law in petition). [Resp. App. 58a]

1. Petitioners mischaracterize the Alaska legislature's motive as a "purported need to infringe on the liberty" of convicted sex offenders. [Pet. 2] In actuality, it was the need to protect the public from recidivist sex offenders that

motivated the legislature's action. *Smith*, 538 U.S. at 105 ("recidivism is the statutory concern"); 1994 Alaska Sess. Laws ch. 41, § 1 [Pet. App. 5a]. This in turn necessitated that the privacy interests of those offenders, on balance, must yield to the government's superior public safety interest. *Id.*

2. Petitioners assert that the central registry "label[s] the registrant as dangerous persons [*sic*] to be avoided." [Pet. 2] As evidence of this, they cite two statutes. This is the first instance in which petitioners have cited these statutes, which were enacted in 1998, as having any bearing on their claims. The first, Alaska Statute 11.51.100(a)(2), defines first-degree endangering the welfare of a child as leaving a child with a nonparent who is required to register under the Act. [Resp. App. 48a] The second, Alaska Statute 47.10.011(7), provides that leaving a child with a person who required to register under the Act amounts to prima facie evidence that the "child is at substantial risk of being sexually abused."[3] [Resp. App. 55a]

The statutes cited by petitioners exist independent of the Act. Reference to persons required to register under the Act has no purpose other than to provide a shorthand description of the persons who are the object of the statutes. The statutes could have described (but more verbosely) their object, without referring to the Act, as persons who had been convicted of specific sexual offenses within a particular time frame.

Petitioners also rely on those same two statutes as purported evidence that fundamental parental rights may be infringed "[s]olely as a result of the [Act]." [Pet. 4] But this

---

[3] Petitioners also cite Alaska Statute 34.70.050. [Pet. 2; Resp. App. 54a] But this provision merely requires notice to a transferee of residential property that the transferee is responsible for determining whether a convicted sex offender lives in the vicinity; it does not even refer to the Act.

misstates the effect of the Act and the statutes. Any alleged infringement of parental rights or criminal prosecution under those statutes results not from a sex offender's duty to register, but rather as a result of someone other than a sex offender leaving a child with a convicted sex offender. Again, referring to registered sex offenders is used only as a shorthand method of describing those with whom a child may not be left. Moreover, Alaska Statute 11.51.100(a)(2) applies only when the sex offender with whom a child has been left is not that child's parent and thus cannot affect the parental rights of a registered sex offender.

3. Petitioners assert that the Act requires convicted offenders to "gather, collate, verify, and deliver a variety of information about themselves and their crimes." [Pet. 3] This grossly overstates the requirements of the Act. The one-page form used for initial registration and periodic verification calls for information that most people inherently know: name, height, weight, date of birth, gender, address, employer, employer's address, and home and work telephone numbers. Alaska Dep't of Public Safety, *Sex Offender/Child Kidnapper Registration Form*, ¶¶ 1-11, 13-33, 37, 38.[4] Though other information might not be committed to memory, it is readily obtainable: license plate and vehicle identification numbers of vehicles to which an offender has access, and the offense, date, and court of record for each offense of which an offender was convicted. *Id.* at ¶¶ 34-35.

Petitioners also assert that the Act requires convicted offenders to "collect and release mental health records." [Pet. 3] Nothing could be further from the truth. The Act requires only that an offender indicate whether he or she has received postconviction mental health treatment. Alaska Stat. 12.63.010(b)(1)(H). [Pet. App. 10a] This takes the form

---

[4] Available at http://www.dps.state.ak.us/nSorcr/pdf/12-29961_Oct 2002 .pdf (visited August 11, 2004).

of simple "yes" and "no" check boxes on the registration form. *Sex Offender/Child Kidnapper Registration Form*, ¶ 36. Nothing in either the Act or the regulations [Pet. App. 27a-35a] requires offenders to collect or release mental health records.

4. Petitioners cite a law amended in 2003, Alaska Statute 44.41.035(b)(5), that requires those who must register as sex offenders to submit a DNA sample for inclusion in Alaska's DNA identification registration system. [Pet. 3; Pet. App. 21a-27a] Petitioners never asserted this claim in the district court. They first asserted this claim in their supplemental brief in the Ninth Circuit, but that court did not consider it. Nor should this Court.

More important, the DNA collection statute is not part of the Act and, like the other statutes newly cited by petitioners, simply refers to the requirement of registration as a shorthand method of describing those who must submit to DNA collection. Petitioners are thus mistaken when they assert that their Fourth Amendment rights are infringed "solely as a result of the [Act] and its provisions." [Pet. 4] Any infringement, even assuming one exists, comes not as a result of the Act, but rather as a result of the fact that a person has been convicted of a sex offense.

5. Petitioners mention in passing that some of the information they must provide is protected under "other state and federal laws such as State laws prohibiting access to motor vehicle records, and federal law prohibiting access to medical and mental health records." [Pet. 3, 5] Petitioners do not specify any of these laws. As stated above the Act does not require sex offenders to disclose or authorize access to any of their medical or mental health records.

No Alaska statute prohibits disclosure of information about registered motor vehicles. Personal information, *i.e.*, "information that identifies a person," contained in Alaska's motor

vehicle records may be disclosed only for specific purposes, which include "use by a government agency." Alaska Stat. 28.10.505(d)(1). [Resp. App. 51a] Notably, the Act does not require a sex offender to identify the owner of any motor vehicles or to provide information about anyone other than the offender. Alaska Stat. 12.63.010(b)(1); *see also Sex Offender/Child Kidnapper Registration Form*, ¶ 34.

REASONS FOR DENYING THE PETITION

The Ninth Circuit correctly ruled that the Act infringes neither the petitioners' procedural due process rights nor their substantive due process rights. That ruling does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is therefore unwarranted.

The respondents will first explain why the Ninth Circuit's decision is correct. The Ninth Circuit dealt with the petitioners' substantive due process claim in a general fashion without separately analyzing each of the liberty interests now asserted by the petitioners. Though that court's conclusion was correct, respondents believe it necessary to briefly discuss the individual interests asserted by petitioners. Respondents will conclude by explaining why this case also does not satisfy the criteria for this Court's review.

The Ninth Circuit decided this case correctly. The Due Process Clause affords special protection to "fundamental rights and liberties." *Glucksberg*, 521 U.S. at 720-21. This Court has described those rights and liberties as "objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* (internal quotations marks omitted). The Due Process Clause prohibits government infringement of rights and liberties deemed fundamental, no matter how reasonable, "unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993), *quoted*

in Glucksberg, 521 U.S. at 721. If the right or liberty asserted is nonfundamental, however, then the government action need only be reasonably related to a legitimate state interest. *Flores*, 507 U.S. at 305; *see also Glucksberg*, 521 U.S. at 722; *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

The beginning point of substantive due process analysis is a "'careful description' of the asserted fundamental liberty interest." *Glucksberg*, 521 U.S. at 721 (quoting *Flores*, 507 U.S. at 302). The Ninth Circuit described the interest claimed here as the "right to be free from the registration and notification requirements [of the Act]." *Tandeske*, 361 F.3d at 597. Implicit in this claim is a purported right of a convicted sex offender to conceal from the public truthful information in which he or she has no reasonable expectation of privacy.

1. Petitioners err in their unsupported claim that the requirement to register infringes a fundamental liberty interest.[5] Indeed, this Court has suggested that registration

---

[5] Petitioners' due process claims have transmogrified over the course of these proceedings. Their amended complaint, in addition to alleging violations of their rights to live peaceably, to work, to travel, and to contract, specifically alleged two violations of the Fourteenth Amendment's Due Process Clause, both of which are procedural. The first is a denial of their right to rehabilitation under the Alaska Constitution, article I, section 12, and the other is a denial of their right to prove that they no longer pose a danger to the community. [Am. Compl. ¶¶ 16, 46, 118, 131]

The Alaska Constitution requires that criminal administration be based on the "need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation." ALASKA CONST. art. I, § 12. This provision deals with "penal administration" and thus guarantees a defendant rehabilitative treatment while incarcerated. *Abraham v. State*, 585 P.2d 526, 531, 533 (Alaska 1978) (prisoner has right to rehabilitative alcohol treatment). Petitioners have yet to explain how the Act unduly, if at all, interferes with their rehabilitation, particularly in light

laws are valid exercises of the government's police power: "Registration laws are common and their range is wide." *Lambert v. California*, 355 U.S. 225, 229 (1957) (reversing conviction for failure to register as convicted felon in absence of proof of actual knowledge of registration requirement). *See also United States v. Harriss*, 347 U.S. 612, 625 (1954) (federal statute requiring registration of lobbyists did not infringe lobbyist's First Amendment rights); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 72 (1928) (statute requiring registration of certain associations, such as Ku Klux Klan, was valid exercise of state's police power and did not deprive member of liberty interest by denying right of association), *both cited in Lambert*, 355 U.S. at 229; *Russell v. Gregoire*, 124 F.3d 1079, 1089 (9th Cir. 1997) ("registration is typically and historically a regulatory measure").

As to the public availability of registration information, this Court long ago rejected the proposition that "publiciz[ing] a record of an official act such as an arrest" violated the arrestee's liberty interest. *Paul v. Davis*, 424 U.S. 693, 713 (1976). The Court echoed this principle in the context of petitioners ex post facto challenge to the Act when it wrote that "dissemination of truthful information in furtherance of a legitimate governmental objective" does not amount to punishment. *Smith*, 538 U.S. at 98. Providing this information is a part of a "tradition" mandating that the criminal justice process take place only in public: "[t]ransparency is essential." *Id.* at 98-99. *Cf. Press-Enterprise Co. v. Superior*

---

of the fact that they were no longer incarcerated when the Act went into effect.

This Court has already rejected the claim that sex offender should have the right to a hearing to demonstrate that he poses no actual danger to the community when registration is based solely on the existence of sex offense conviction. *See Connecticut Dep't of Public Safety v. Doe*, 538 U.S. at 7-8. That case defeats both of the procedural claims asserted in the petitioners' amended complaint.

Court, 464 U.S. 501, 508-10 (1984) (openness of criminal process "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system"; only compelling state interest will justify closure). This tradition of openness in our criminal process would be substantially compromised if it did not extend to the records of that process.

Most important, it is this tradition of openness in the criminal justice process that is "objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 720-21. Petitioners' claim that the concealment of truthful information about an individual and his or her sex offense conviction is a fundamental liberty interest would turn that tradition on its head.

Absent authority supporting the existence of a fundamental right to be free of the registration and public disclosure requirements of the Act, the Ninth Circuit correctly rejected petitioners' claim of such a right and correctly applied the reasonable-basis test. This Court has already concluded, albeit in the ex post facto context, that the Act satisfies that relationship. *Smith*, 538 U.S. at 98-99, 102, 103, 104, 105.

Petitioners attempt to distinguish *Smith* because it involved an ex post facto challenge. [Pet. 10, 12] But this attempt must fail. A state interest legitimate under one provision of the Constitution does not become illegitimate under another. *See Paul P. v. Verniero,* 170 F.3d 396, 404 (3d Cir. 1999) (public interest in knowing whereabouts of sex offenders does not differ depending upon nature of constitutional claim). Similarly, a law's reasonable relation to a legitimate governmental interest under one provision of the Constitution does not become unreasonable under another. *See id.* Petitioners have presented no justification for this Court to revisit its analysis in *Smith.* This Court's review is unwarranted.

Petitioners have not shown due process violations with respect to any of the specific liberty interests they have asserted in their petition. As mentioned petitioners asserted in their supplemental brief filed in the Ninth Circuit a variety of specific interests they claim are infringed by the Act. Save for the right to interstate travel, which the Act does not violate, none of those interests have been recognized as fundamental.

1. Petitioners claim that the Act "subject[s] them to all sorts of burdens, costs, fees, loss of housing—loss of employment—loss of public services—restrictions on interstate travel, and it infringes on . . . [their] right to enjoyment of the community."[6] [Pet. 4-5, 11]

But the Act imposes no such burdens or restrictions. The "Act imposes no physical restraint . . . [and] does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences." *Smith*, 538 U.S. at 100. Registered sex offenders "are free to move where they wish and to live and work as other citizens, with no supervision." *Id.* at 101. Further, the record below failed to disclose "substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers or landlords." *Id.* at 100. And the record identified only one incident of community hostility suffered by a sex offender after his registration information became public. *Id.* Moreover, any adverse effects on convicted sex offenders resulting from the availability of registration information "flow[s] not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Id.* at 101. These observations by the

---

[6] Petitioners do not explain either here or in the proceedings below what costs and fees the Act has imposed on them; nor do they explain what loss of public services they have suffered.

Court make clear that the Act does not infringe on petitioners' asserted rights to housing, employment, public services, or interstate travel.

2. Petitioners also assert that the Act is intended as a "means of supervising" and monitoring convicted sex offenders. [Pet. 2, 5-6, 9, 11] But this Court expressly rejected any parallel between the Act's registration scheme and supervised release. *Smith*, 538 U.S. at 101. Registered offenders "are free to move where they wish and to live and work as other citizens, with no supervision" and, while they must inform the authorities of certain changes in their lives, "they are not required to seek permission to [make those changes]." *Id.*

As evidence of Alaska's purported intent to keep convicted sex offenders under supervision, petitioners assert that "they may be called to the police station at the whim of the State or visited at home or work and required to answer questions or provide information." [Pet. 5-6] This is incorrect. The Act requires that a sex offender go to a police station only to register for the first time; subsequent verification may be submitted by mail. *Compare* Alaska Stat. 12.63.010(b) *with* Alaska Stat. 12.63.010(d) *and* 13 Alaska Admin. Code 09.025(d), (e). [Pet. App. 9a-11a, 28a-29a] Though a sex offender *may* be required to appear in person every five years to be photographed, the department can authorize an offender to submit a new photograph without having to appear. 13 Alaska Admin. Code 09.030(b). [Pet. App. 29a-30a]

3. Petitioners also assert that the Act infringes their "right to personal security." [Pet. 4-5] To support this they cite a law review article and media reports of acts of vigilantism committed against sex offenders in states other than Alaska. [Pet. 6-7] This is insufficient to establish that the Act creates a substantial risk of similar incidents committed against petitioners or other convicted sex offenders in Alaska. Indeed, this court acknowledged only one incident of

community hostility toward a sex offender since the Act went into effect. *Smith,* 538 U.S. at 100. At the same time, the Court observed that the incident could have been prompted by information already in the public domain. *Id.* Moreover, the registry web site specifically warns users that "[a]nyone who uses this information to commit a criminal act against another person is subject to criminal prosecution." *Sex Offender Registration Central Registry.*

4. Petitioners also assert a freedom from interference, government monitoring, and supervision, along with a right to return to society after completing their sentences. [Pet. 9] They claim this falls with the scope of their right to personal autonomy. [*Id.*] They overstate the effects of the Act and thus err when they claim that it violates their right to reintegration into society by keeping them "under the shadow" of their crimes, keeping them "under suspicion," and requiring "reporting on demand." [*Id.*]

As noted above the Act results in no supervision or direct monitoring of sex offenders. *Smith*, 538 U.S. at 101 (rejecting comparison of registration system to supervised release). Further, the Act results in no interference with the lives of sex offenders other than imposing a duty to register in person initially and then to periodically verify in writing their registration information. These duties cannot be reasonably viewed as significantly impeding a sex offender's ability to lead a normal life. Similarly, making available to the public truthful information about sex offenders cannot be reasonably viewed as keeping sex offenders constantly under suspicion. Nothing in the Act requires a sex offender to report "on demand." *See* Alaska Stat. 12.63.010(b), (d); 13 Alaska Admin. Code 09.025(d), (e). [Pet App. 9a-11a, 28a-29a]

None of the rights of personal autonomy asserted by petitioners fall within the "outlines of the 'liberty' specially protected by the Fourteenth Amendment[, which] . . . have at least been carefully refined by concrete examples involving

fundamental rights found to be deeply rooted in our legal tradition." *Glucksberg*, 521 U.S. at 722. Those examples include the right to marry, to have children, to direct the education and rearing of one's children, to marital privacy, to use contraception, to bodily integrity, to abortion, and to refuse unwanted medical treatment. *Id.* at 720 (citations omitted). These rights "involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [that] are central to the liberty protected by the Fourteenth Amendment." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992), *quoted in Lawrence v. Texas*, 123 S.Ct. 2472, 2481 (2003). Petitioners make much of the Ninth Circuit's failure to mention *Lawrence*. [Pet. 10-11] But neither the Act nor petitioners' claims involve the type of intimate or personal choices remotely similar to those at stake in *Lawrence*. The Act has no effect on the constitutionally protected aspects of personal autonomy of convicted sex offenders. At the same time the Act affords significant safety to those who might have contact with sex offenders.

6. Petitioners also make the novel claim, not made in either the district court or the Ninth Circuit, that federal courts should be able to conduct substantive due process review of a state statute that violates no federal liberty interests.[7] [Pet. 11-12] Petitioners reason that this is merely a logical extension of federal procedural due process review of claimed violations of state liberty interests. [*Id.*] Because petitioners raise this claim for the first time in their petition, this Court should not consider it. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) (except in exceptional circumstances, "this Court does not decide questions not raised or resolved in the lower court").

---

[7] In the district court they argued only that the Act violated their state-law liberty interests without procedural due process. [*See* Resp. App. 36a-37a, 39a, 43a-44a]

In the event the Court considers reviewing this claim, it should decline to do so. Petitioners premise their theory on the absence of any liberty interest cognizable under the Due Process Clause and the presence of an interest purportedly cognizable solely under state law. But liberties acquire federal protection under the Due Process Clause because they are "deeply rooted" in our *national* history and tradition such that they are "implicit in the concept of ordered liberty." *Glucksberg,* 521 U.S. at 720-21 (internal citation omitted). Liberties arising exclusively under state law, by definition, have no roots in our national history or tradition. Laws purporting to violate exclusively state liberty interests are thus beyond the reach of substantive review by federal courts unless they also violate federal law. Petitioners' unprecedented and unsupported theory would be antithetical to principles of federalism by effectively allowing federal courts to determine whether state statutes violate state law, a province heretofore reserved exclusively to state courts. *Cf. Missouri v. Hunter*, 459 U.S. 359, 368 (1983) (Supreme Court bound to accept state supreme court's interpretation of state statute but not bound by state court's conclusion that statute violates federal law).

7. Petitioners assert that the Act characterizes them as dangerous without affording them the opportunity to establish that they are not. [Pet. 5] The Ninth Circuit correctly rejected this claim based on *Connecticut Department of Public Safety*, 538 U.S. at 7-8. *Tandeske*, 361 F.3d at 596.

8. Petitioners imply that the Act's characterization of convicted sex offenders as collectively dangerous infringes on their reputation interests. [Pet. 2] But a person's interest in his or her reputation is not a liberty or property interest cognizable under the Fourteenth Amendment. *Paul*, 424 U.S. at 712. For a reputation interest to become cognizable under the Fourteenth Amendment, the government must also "distinctly alte[r] or extinguis[h]" or "officially remov[e]"

from state recognition or protection a right or status recognized under state law. *Id.* at 711. Petitioners can point to no right or status recognized under Alaska law that is altered, extinguished, or removed from protection by the Act.

9. In their supplemental brief petitioners bring to the Court's attention the recent decision in *Doe v. State, Department of Public Safety*, 92 P.3d 398 (Alaska 2004) ("*Doe v. State*"). [Supp. Br. 2; Supp. Br. App. 36a] Citing the principle that state courts are the ultimate expositors of state law, petitioners claim that *Doe v. State* negates this Court's determinations in *Smith* regarding the effects of the Act and therefore supports their petition. [Supp. Br. 1] Alternatively, they assert that it supports summarily granting their petition, vacating the Ninth Circuit's decision, and remanding the case for that court's consideration of *Doe v. State*. [*Id.*] Petitioners ignore crucial aspects of *Doe v. State* and thus are mistaken as to its impact on this case.

In *Doe v. State*, the Alaska Supreme Court decided the narrow issue whether the Act applied to a sex offender whose conviction had been "set aside" after he received a suspended imposition of sentence and successfully completed probation, but before the Act became specifically applicable to such convictions that had been set aside. The court concluded, based solely on Alaska's more rigorous constitutional due process guarantee, that the Act did not apply in those circumstances. *Doe v. State*, 92 P.3d at 400, 404. [Supp. Br. 37a; Supp. Br. App. 47a]

The setting aside of the conviction, according to the Alaska Supreme Court, was based on judicial findings that the offender "presented no significant risk to the community." *Doe v. State*, 92 P.3d at 408 [Supp. Br. App. 57a-58a] With respect to consequences that flowed from the now set-aside conviction, those findings precluded any "subsequent reconsideration whether he posed a significant risk of [reoffending]." *Id.* [Supp. Br. App. 58a] Requiring the

offender to register would effectively reclassify the offender from a person whose conviction had been set aside "to that of a person whose conviction still stands." *Id.* [Supp. Br. App. 61a] In this context the Alaska Supreme Court described the effects of the Act in a manner that, according to petitioners, diverges from this Court's analysis in *Smith*. *Id.* at 409-11. [Supp. Br. App. 61a-65a]

Doe v. State provides no meaningful traction for petitioners in this case, and there is no need to review the Alaska Supreme Court's analysis of the effects of the Act. *Doe v. State* involved a sex offender who, unlike petitioners, had his conviction set aside and whose legal status therefore differed significantly from petitioners', who remain convicted sex offenders. That fact has an overarching impact that drives the court's analysis of the effects of the Act and leads to conclusions different from those reached by this Court in *Smith*. This difference is further magnified by the fact that the Alaska Supreme Court analyzed the Act exclusively within the context of the Alaska Constitution and its "more rigorous" protections afforded to liberty interests than those encompassed by the Due Process Clause. *Doe v. State*, 92 P.3d at 404. [Supp. Br. App. 48a] And most important, the Alaska Supreme Court expressly limited the scope of its decision to only those sex offenders whose convictions were set aside before the Act "became specifically applicable to convictions that were set aside." *Id.* at 412. [Supp. Br. App. 68a] This strongly suggests that any effects of the Act described in *Doe v. State* do not reach constitutional magnitude with respect to those whose convictions were not set aside until after the Act became applicable to set-aside convictions.

Rule 10 considerations. Notably missing from the petition is an attempt to provide any compelling justification for issuance of a writ of certiorari. *See* Sup. Ct. Rule 10 ("A

petition for a writ of certiorari will be granted only for compelling reasons."). [Resp. App. 58a] Indeed, none appears to exist.

1. *No conflict of authority exits among the courts of appeal.* Petitioners cite no conflict between the Ninth Circuit's decision in this case and a decision of the court of appeals of another circuit on the "same important matter." Sup. Ct. Rule 10(a). [Resp. App. 58a] Though no courts of appeals have directly addressed substantive due process claims relating to registration statutes, they have refused to find, in the context of procedural due process, protected liberty interests similar to those asserted by petitioners and rejected by the Ninth Circuit in this case.[8]

2. *No conflict of authority exists among the highest courts of the states.* Petitioners also cite no conflict between the Ninth Circuit's decision and decisions by state courts (other than the purported conflict with the Alaska Supreme Court in *Doe v. State*). *See* Sup. Ct. Rule 10(a). State courts (and the District of Columbia) appear to be unanimous in their refusal to find protected liberty interests similar to those asserted by petitioners.[9]

---

[8] *See Artway v. Attorney General,* 81 F.3d 1235, 1268 (3d Cir. 1996) (sex offender has no liberty interest in purported reputation damage that accompanies registration; citing *Davis,* 424 U.S. at 701); *Cutshall v. Sundquist,* 193 F.3d 466, 479 (6th Cir. 1999) (Tennessee's sex-offender registration act imposes no restrictions on offender's fundamental personal rights or those implicit in concept of ordered liberty); *Paul P. v. Verniero,* 170 F.3d 396, 404 (3d Cir. 1999) (public disclosure of sex offenders' registration information does not violate privacy-based liberty interest). *Doe v. City of Lafayette,* _F.3d_, 2004 WL 1698309, *__ (7th Cir., July 30, 2004), and *Gunderson v. Hvass,* 339 F.3d 639, 643-45 (8th Cir. 2003), rejected substantive due process challenges based on interests different from those asserted by petitioners.

[9] *See Hemline v. State,* 784 A.2d 1058, 1071-74 (Del. 2001) (concluding that no federal liberty interest is implicated by sex-offender registration law); *In re W.M.,* 851 A.2d 431, 447-51 (D.C. 2004) (sex-

In addition, the Alaska Court of Appeals has rejected claims similar to those asserted by petitioners. In *Patterson v. State*, 985 P.2d 1007 (Alaska App. 1999), the court concluded that the Act does not violate Alaska's explicit constitutional privacy guarantee, *id.* at 1016-17, and does not violate substantive due process based on asserted violations of the rights to travel, to obtain employment, or to personal safety, *id.* at 1017-18. The Alaska Supreme Court's decision in *Doe v. State* might appear to overrule *Patterson v. State*, but that is not the case. Unlike the offender in *Doe v. State*, the defendant in *Patterson* did not have the benefit of a suspended imposition of sentence and conviction that was ultimately set aside.

Petitioners' substantive due process claim has evolved and mutated from the purely procedural claim asserted in their amended complaint, to their claims in motions for summary judgment in the district court, to their briefs in the Ninth Circuit, and finally in their petition in this Court. This problem is compounded by the manner in which they have presented those claims at each level. This has created a practical difficulty in failing not only to "carefully formulat[e] the interest at stake," *Glucksberg*, 521 U.S. at 722, but also in failing to sharpen the issues necessary for

---

offender registration act does not violate substantive due process (applying fundamental-rights test)); *In re J.A.W.*, 787 N.E.2d 747, 757-60 (Ill.), *cert. denied*, 124 S.Ct. 222 (2003) (registration provisions of sex-offender registration act do not violate substantive due process (applying nonfundamental-rights test)); *In re J.R.*, 793 N.E.2d 687, 695-96 (Ill. App. 2003) (notification provisions of sex-offender registration act do not violate substantive due process (applying nonfundamental-rights test)); *State v. Druktenis*, 86 P.3d 1050, 1066-84 (N.M. App. 2004)(sex offender registration law does not violate substantive due process (applying fundamental- and nonfundamental-rights test)); *State v. Williams*, 728 N.E.2d 342, 355-57 (Ohio 2000) (sex-offender registration does not violate inalienable-rights guarantee of state constitution).

meaningful review by this Court. In light of the fact that substantive due process challenges have been rejected by every court that has considered the issue, this Court should at best await a challenge in which the issues have been drawn and discussed with more precision than has been done in this case.

Petitioners pointedly refer to statements by this Court that they characterize as expressing merit to their claims. [Pet. 8, 9] In *Smith*, the Court simply acknowledged that "other constitutional objections" to the Act were "beyond the scope of this opinion." *Smith*, 538 U.S. at 102. In *Connecticut Department of Public Safety*, the Court noted the possibility that the claim asserted in that case might have been a substantive challenge to the statute recast as a procedural challenge. *Connecticut Dep't of Public Safety*, 538 U.S. at 7-8. In neither case did the Court express any opinion as to the merit of any substantive due process challenge to the statutes considered or to sex offender registration laws in general.

Finally, petitioners' reliance on *Doe v. State*, in an attempt to impeach the Court's analysis in *Smith* of the effects of the Act, is tantamount to a claim of erroneous factual finding. Such a claim "rarely" supports the granting of a writ of certiorari. See Ct. Rule 10. [Resp. App. 58a]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GREGG D. RENKES
Attorney General

KENNETH M. ROSENSTEIN *
Assistant Attorney General

STATE OF ALASKA
Department of Law
Office of Special Prosec. & Appeals
310 K Street, Suite 308
Anchorage, Alaska 99501
(907) 269-6250

* Counsel of Record

August 26, 2004

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

[March 31, 1999]

No. A94-0206-CV (HRH)

John Doe, *et al.*,

Plaintiffs,

vs.

Ronald L. Otte, Commissioner, *et al.*,

Defendants.

ORDER

Cross-Motions for Summary Judgment

Defendants move for partial summary judgment.[1] This motion is opposed. Plaintiffs' cross-move for summary judgment.[2] This motion is also opposed. Oral argument has not been requested.

FACTS

Plaintiffs are two convicted sex offenders, John Doe I and John Doe II, and Jane Doe, wife of John Doe I. They are challenging Alaska's Sex Offender Registration Act ("ASORA"), AS 12.63.010 to -.100 (1994) and AS 18.65.087 (1994),[3] on both federal and state constitutional grounds.

---

[1] Clerk's Docket No. 95.

[2] Clerk's Docket No. 107.

[3] In 1998 and 1999, changes were made by the Alaska Legislature to the registration and notification provisions of ASORA. The plaintiffs moved for leave to file a supplemental brief addressing the changes made.

Defendants are Ronald L. Otte, Commissioner of the Department of Public Safety for the state of Alaska and Bruce M. Botelho, Attorney General for the state of Alaska. They are named in both their official and individual capacities.

Prior to the enactment of ASORA in 1993, hearings were held before the Alaska Legislature. Testimony before the legislature showed that there is a high level of sexual abuse in Alaska, a large and growing number of sexual offenders in Alaska, and a high level of recidivism in sex offenders.

With respect to the high level of sexual abuse in Alaska, the testimony showed that Alaska had the highest child sexual abuse rate in the nation; the rate was said to be approximately six times the national average.[4] Moreover, the sexual assault rate was reported to be the second highest in the nation.[5] Finally, the incidence of rape had increased 91% in the previous two years.[6]

Testimony also indicated that there are a large number of sexual offenders in Alaska. In 1993, for instance, approximately one-fourth of Alaska's prison inmates were incarcerated for sexual offenses.[7] In 1993, 100 sex offenders were

---

Clerk's Docket No. 115. The court's analysis of ASORA on the parties' cross-motion for summary judgment addresses the substance of ASORA which was not affected by the recent changes. The nmotion for leave to file supplemental brief is denied.

[4] Hearing on HB 69 before the House State Affairs Committee, 18th Alaska Legislature, 1st Session (Feb. 2, 1993). Hearing on CSHB 69 before the Senate Finance Committee, 18th Alaska Legislature, 1st Session (Apr. 28, 1993).

[5] *Id.*

[6] Hearing on CSHB 69 before the Senate Finance Committee, 18th Alaska Legislature, 1st Session (Apr. 28, 1993) (testimony of Cindy Smith, Executive Director, Network on Domestic Violence and Sexual Assault.

[7] Hearing on HB 69 before the House Finance Committee, 18th Alaska Legislature, 1st Session (Mar. 3, 1993) (testimony of C.E. Swackhammer, Deputy Commissioner, Dept. of Public Safety).

scheduled to be released, whereas prior to 1993, only 50 sex offenders were released annually.[8] Finally, studies presented to the legislature evidenced an extremely high recidivism rate for sex offenders.[9]

The Alaska Legislature made the following legislative findings:

(1) sex offenders pose a high risk of reoffending after release from custody;

(2) protecting the public from sex offenders is a primary governmental interest;

(3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and

(4) release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety.

§ 1, Ch. 41, SLA 1994.

Based upon this legislative fact-finding, the Alaska Legislature enacted ASORA which included both registration and notification provisions for sex offenders. "Sex offender" is defined as a person convicted of a sex offense[10] in any jurisdiction, regardless of whether the conviction occurred before, after, or on August 10, 1994 (the effective date of

---

[8] Hearing on HB 69 before the House Finance Committee, 18th Alaska Legislature, 1st Session (Feb. 10, 1993) (testimony of Cindy Smith).

[9] Hearing on HB 69 before the House Finance Committee, 18th Alaska Legislature, 1st Session (Feb. 10, 1993).

[10] Sex offense is defined in AS 12.63.100(3) (1994) as a crime, or an attempt to commit a crime, under AS 11.41.410 to 11.41.438, AS 11.41.450, AS 11.41.455, AS 11.61.125, AS 11.66.110, former AS 11.15.120 or AS 11.15.134, or former AS 11.40.110 or AS 11.40.200, or a similar law in another jurisdiction.

ASORA). To fulfill the registration requirements, a sex offender must register in person at the Alaska state trooper post or municipal police department located nearest to where the sex offender resides at the time of registration and (1) complete a registration form which includes, at a minimum, the sex offenders name, address, place of employment, date of birth, each conviction for a sex offense for which there is a duty to register, all aliases used, and driver's license number; (2) be fingerprinted, and (3) be photographed. AS 12.63.010(b)(1)-(2) (1994).

The registration requirements end 15 years after an offender's unconditional discharge if the offender has only one prior sex offense, but continue for the offender's lifetime if the offender has been convicted of two or more sex offenses. AS 12.63.020(a) (1994).

The notification provisions provide that the public can have access to the offender's name, date of birth, address, photograph, place of employment, and public information about the conviction (date, place, court of conviction, and length of sentence.) AS 18.65.087 (b) (1994). The Department of Public Safety is charged with maintaining a central registry of sex offenders. AS 18.65.087(a) (1994).

Up until June of 1997, anyone could purchase a complete list of the state's registered sex offenders or have a specific search conducted for $10.[11] In addition, a person could look at the list for free at Alaska state trooper offices. "In an ongoing effort to make Alaska communities safer and give the public easy access to information about people convicted or rape of child molestation." The Department of Public Safety made the Alaska Sex Offender Registry database available worldwide via the Internet at http://www.dps.state.ak.us/sorcr/ in June of 1997.[12] At the same time, the state

---

[11] Clerk's Docket No. 107, Exhibit 4.

[12] Clerk's Docket No. 197, Exhibit 5 at 1.

waived any charges or fees for requests of paper copies of the list of sex offenders to make the "information available to as many citizens as possible."[13] The opening display of the registered sex offender Internet site contains the following warning: "This information is made available for the purpose of protecting the public. Anyone who uses this information to commit a criminal act against another person is subject to criminal prosecution."[14]

The plaintiffs first brought this suit in 1994. They moved for a preliminary injunction seeking to enjoin the enforcement of ASORA. The motion was denied in part and granted in part. The court found that John Doe I and Doe II were required to register under ASORA; however, it enjoined the state from releasing their registration information as part of the notification procedures. *Rowe v. Burton*, 884 F. Supp. 1372 (D. Alaska 1994).[15]

Plaintiffs John Doe I and John Doe II assert that their civil rights afforded by the United States' [sic] Constitution have been violated because ASORA constitutes: (1) a law by the state of Alaska that modifies existing or prior contracts in violation of Aticle I, Section 10; (2) denial of due process and a violation of the Equal Protection Clause guaranteed by the Fourteenth Amendment; (3) an *ex post facto* law prohibited by Article I, Section 10; (4) an unreasonable search or seizure prohibited by the Fourth Amendment; and (5) an invasion of

---

[13] *Id.*

[14] http://www.dps.state.ak.us/sorcr/.

[15] The plaintiffs filed their complaint pseudonymously to prevent disclosure of their identities, and the court ordered them to file an amended complaint using their true names. Clerk's Docket No. 62. When the plaintiffs refused to comply, the court dismissed the case, appealed, and the Ninth Circuit Court of Appeals reversed the dismissal for failure to file in the plaintiffs' true names and remanded for reinstatement of their complaint and the preliminary injunction and for further proceedings.

the plaintiffs' right to privacy. In addition, Jane Doe asserts her own claim that ASORA violates her right to privacy.

In addition, plaintiffs assert numerous pendant state law claims contending that ASORA violated the Alaska Constitution because it constitutes: (1) an invasion of privacy under Article I, Section 22; (2) a denial of due process inconsistent with Article I, Section 7; (3) an *ex post facto* law prohibited by Article I, Section 15; (4) a violation of the Equal Protection Clause guaranteed by Article I, Section 12.

The court shall grant summary judgment under Federal Rule of Civil Procedure 56© only if "there is no genuine issue as to any material fact and [ ] the moving party is entitled to judgment as a matter of law." Summary judgment is required if the non-moving party fails to make a showing sufficient to establish the existence of an essential element and upon which the non-moving party bears the burden of proof at trial. *Celotex Corp v. Catrett*, 477 U.S. 317, 324 (1986).

DISCUSSION

Defendants assert that they are entitled to summary judgment on plaintiffs' claim that ASORA: (1) is an *ex post facto* law,[16] (2) violates their plea bargain contracts; and (3) violates their right to privacy. Plaintiffs cross-move for summary judgment on all their claims.

---

[16] Defendants also asset that they are entitled to summary judgment on a claim that ASORA violates the Double Jeopardy clause of the Fifth Amendment of the United States Constitution. However, as the plaintiffs' point out, the Does are not challenging ASORA based upon the claim that it violated the double jeopardy clause. The State's motion for summary judgment on the issue that ASORA does not violate the Double Jeopardy clause is denied because that issue is not before the court.

A.

Ex Post Facto Claim

Plaintiffs claim ASORA is an *ex post facto* law. Article I, Section 10, of the United States Constitution provides that no state shall pass any *ex post facto* law. As *ex post facto* law is one "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then described." *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (quoting *Cummings v. Mission*, 4 Wall. 277, 324-26 (1867)). Therefore, the question is whether the registration and/or the notification provisions of ASORA constitute punishment. The parties cross-move for summary judgment on this issue.

Defendants assert that *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert denied* __ U.S. __, 118 S. Ct. 1191 (1998), is dispositive. In *Russell*, the Ninth Circuit held that the registration and notification provisions of the Washington registered sex offender law did not violate the *ex post facto* clause. Plaintiffs seek to distinguish *Russell* on grounds that the registration and notification provisions present in ASORA differ significantly from the Washington law analyzed in *Russell*. They assert that even under *Russell*, the ASORA registration and notification provisions constitute punishment and violate the *ex post facto* clause, thereby entitling them to summary judgment as a matter of law.

The court must employ the "intent-effects" test to determine whether ASORA imposes punishment in violation of the *ex post facto* clause. *Russell*, 124 F.3d at 1087. This test requires that the court first inquire whether the legislature intended the sanction to be punitive. The "intent" prong deals solely with the declared purpose of the legislature as well as the construction and design of the staute. *Id.* Second, the court must consider whether the sanction is so punitive in effect as to prevent the court from viewing it as regulatory or

civil in nature, despite the legislature's intent. *Id.* As to the "effects" prong, a challenging party is required to demonstrate by "the clearest proof" that the statutory scheme is so punitive in effect as to negate the State's non-punitive intent. *Id.*

In *Russell* and *Rowe v. Burton*, the courts considered separately the constitutionality of the registration provisions apart from the constitutionality of the notification provisions. Thus, the court turns first to the registration provisions.

1. Registration Provisions

a. Intent

The court first applies the "intent-effects" test to the registration provisions of ASORA. The court must decide whether the Alaska legislature intended the registration provisions as punitive.

Russell provides this court with guidance as to what to consider in determining the legislature's intent. The court must look to the language of the statute and the overall design of the registration provisions. In *Russell,* the court first looked to the legislative findings as evidencing an unequivocal regulatory motivation. The Washington findings declare:

> "The legislature finds law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency's jurisdiction."

Russell, 124 F.3d at 1087 (*quoting* 1990 Wash. Laws, ch. 3, § 401). Defendants submit that *Russell* is dispositive on the issue that the Alaska legislature did not intend the registration provisions as punitive. According to the defendants, the findings of the Alaska legislature are so similar to those in presented in Washington, that *Russell* mandates that this court

find no punitive intent. Both states' findings focus on the protection of the public. However, as the plaintiffs point out, the findings put forth by the Alaska legislature are much less specific pertaining to the need for registration than are the Washington findings. For example, the Alaska findings simply provide that protection of the public from sex offenders is a primary governmental focus. They seem to be geared more for the notification provisions of ASORA than the registration provisions now under discussion. Yet, this distinction alone does not evidence a punitive intent.

The next step the court must undertake to determine the legislature's intent is to look to the overall design of the registration provisions. In *Russell*, the Ninth Circuit found that the overall design of the Washington provisions evidenced a regulatory, not a punitive, intent. Crucial to the court's decision 'was the following. First, the registration provisions did no more than apprise law enforcement officials of certain basic information about an offender living in the area. Second, the registration provisions did not place any restraint on the offenders' movements because they were free to move so long as they notified law enforcement, and they could comply with the registration requirements by simply mailing a written notice to the sheriff. Finally, the court placed importance upon the fact that the information required was not burdensome. *Russell*, 124 F.3d at 1087.

Defendants again argue that *Russell* controls and that the design of ASORA indicates a regulatory intent because there is no evidence of a penal intent. However *Russell* may be distinguishable on several grounds. First, ASORA's registration provisions do require one to register in person; thereby restraining an offender's movement. Second, the information required as part of registration is slightly more burdensome in that the offender must submit to a photograph and be fingerprinted. While these are distinguishing features, they are not of sufficient weight to require a different result from *Russell*

for the following reasons. First, in *Doe v. Pataki,* the Second Circuit, in considering New York's sex offender registration statute, found that the requirement that a person register in person every 90 days (significantly more onerous than the requirement in Alaska which requires initial registration and registration upon moving) was cumbersome, but not "sufficiently severe to transform an otherwise non-punitive measure into a punitive one." *Doe v. Pataki*, 120 F.3d 1263, 1285 (2d Cr. 1997). Second, the additional requirements of being photographed and fingerprinted are not overly burdensome in light of the considerable benefits to law enforcement deriving from having a photograph and fingerprints to aid in finding an individual if suspected of a future crime.

The plaintiffs then offer six additional arguments in support of their proposition that ASORA registration requirements evidence an objective intent to establish a criminal, not a regulatory, statutory scheme. They point to: (1) the placement of the registration provisions of ASORA (AS 12.63.010) in the state's code of criminal procedure; (2) the focus of the statute; (3) the fact that registration constitutes a new form of post-incarceration supervision; (4) the fact that there is no escape from ASORA's application; (5) the legislature's amending the criminal law by making the registration requirements part of any plea agreement and part of any sentence imposed by the sentencing court; and (6) the imposition of a duty on the offender solely as a result of a past conviction.

According to the plaintiffs, placement of the registration provisions in the state's code of criminal procedure evidences an intent to establish a criminal statutory scheme. Although this court concluded in *Rowe* that codification of ASORA in the criminal code was not evidence of punitive intent, plaintiffs contend that the United States Supreme Court's decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997), requires this court to hold otherwise. In *Hendricks*, the Supreme

Court felt that "Kansas' objective to create a civil proceeding is evidenced by its placement of the Sexually Violent Predator Act within the Kansas probate code, instead of the criminal code." *Hendricks*, 521 U.S. at 361. It follows then, according to the plaintiffs, that placement of the registration provisions of ASORA in the code of criminal procedure establishes a punitive intent.

Defendants rebut this argument on three grounds. First, they submit that while codification of a statute in a particular title is evidence of a legislative intent, it is not conclusive. In support, they refer the court to *Pataki* 120 F.3d at 1278, where the fact that the New York sex offender registration law was codified in "corrections law" was of little relevance to the determination of legislative intent. Second, defendants note that AS 12 is not limited only to matters directly related to the prosecution and punishment of criminal offenses. For example, the code of criminal procedure contains laws relating to medical examiners and actions for post-conviction relief which are civil actions.[17]

Washington designated its registration provisions as Wash. Rev. Code § 9A.44.130-.140, a part of the Washing-ton Criminal Code. The court in *Russell* did not address this issue, nor did it appear concerned about it. This court adheres to its earlier decision that the Alaska Legislature's placement of the registration provisions in the code of criminal procedure is a practical, logical place to locate the registration requirement.

---

[17] Defendants argue that the legislature's codification of a particular statute should not be dispositive of the legislature's intent because the revisor of statutes, not an elected official, has the power to renumber and rearrange the legislature's own codification. However, this argument is weak because the fact remains that the legislature itself intended to place the registration provisions within the code of criminal procedure.

Second, plaintiffs contend that the focus of the registration provisions evidence an intent to establish a criminal statute because ASORA is aimed at sex offenders and not at an activity from which the offender should be barred because of relevant past conduct. They cite *Fleming v. Nestor*, 363 U.S. 603 (1960), for the proposition that if the law is aimed at individuals, rather than an activity from which the individuals should be barred, the law is punitive, not regulatory. *Id.* at 613-14.

However, as the defendants point out, the Supreme Court rioted in *Nestor* that no single, clear basis for deter-mining whether a statute is regulatory or punitive can be derived from the cases leading up to *Nestor* since each case turns on "its own highly particularized context." *Id.* at 616. Moreover, the Supreme Court has upheld laws aimed at individuals rather than at an activity from which the individual should be barred. The Supreme Court did so in *Nestor* where it upheld a statute that terminated social security benefits for persons deported for previous participation in communist activities. *Id.* at 612.21. *See also DeVeau v. Braisted*, 363 U.S. 144 (1960) (upholding a statute that prohibited felons from working for waterfront unions).

The court finds that while the registration provisions are aimed at sex offenders rather than an activity, such is at best slight evidence of a legislative punitive intent.

Third, plaintiffs assert that the registration provisions of ASORA are a criminal statutory scheme, that ASORA is nothing more than a new form of post-incarceration supervision because it requires periodic reporting, notice of change of employer, and notice of change of residence, all of which are conditions imposed on post-incarceration in Alaska. Moreover, ASORA is administered by a criminal justice agency—the state troopers. Defendants do not directly rebut this argument, probably because the registration requirements can be construed as a form of post-incarceration supervision.

The Ninth Circuit in *Russell* did not address this issue. This court finds that the registration requirement is supervisory and is sonic evidence of a punitive intent.

Fourth, plaintiffs argue that the fact that there is no escape from ASORA's application reflects the legislature's intent to enact a criminal statutory scheme. However, as the defendants submit, registration statutes have long been recognized as regulatory, not punitive measures. They refer the court to numerous cases where the Supreme Court has upheld the use of registration statutes. Finally, the defendants remind the court that it previously noticed that "[r]egistration is not a concept which this court perceives to be imbued by history with a punitive connotation." *Rowe v. Burton*, 884 F. Supp. 1372, 1378 (D. Alaska 1994). ASORA is essentially regulatory. Registration *per se* is not punitive. Although neither party points it out, it is possible to escape ASORA's application, although not initiallv. The registration provisions do end after 15 years if a person have been convicted of only one offense. AS 12.63.020(a).

Fifth, plaintiffs submit that the fact that the legislature simultaneously amended the criminal law to make registration provisions part of any plea agreement and part of any sentence imposed by the sentencing court evidences a penal intent. This argument puts the cart before the horse. The legislature enacted the registration provisions in response to their findings that registration would make it easier for law enforcement. Notifying those persons who are newly convicted of sex offense crimes that they will be subject to these registration pro-visions as a result of their conviction is the appropriate and fair thing to do. It does not establish that the legislature intended the registration provisions to be punitive.

Sixth, plaintiffs submit that the imposition of a duty (the duty to report to the authorities, the duty to provide one's fingerprints, the duty to be photographed, and the duty to provide information) on the offender, which is imposed solely

as a result of a past conviction, is clear evidence of an intent to establish a criminal statutory scheme because laws which compel the doing of an act, after the fact, violate the prohibition of the *ex post facto* clause. *Calder v. Bull*, 3 U.S. (3 Dall) 386, 388 (1798).

The plaintiffs misstate the scope of the *ex post facto* clause. The focus is upon laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). ASORA does not define a crime. Whether or not ASORA imposes punishment retroactively begs the question under analysis. For purposes of evaluating the legislature's intent, the duty to register is not inherently punitive. It is not evidence of punishment because ASORA is just another regulatory disability —like the loss of the right to vote or deportation—which results from a prior conviction. The fact that a conviction gives rise to the duty to register does not bespeak a punitive intent. Rather, imposing the duty of registration merely addresses the legislative findings that offenders pose a high risk of re-offending after release from custody.

In summary, the court finds no evidence of penal intent in the Legislative findings, in the Alaska Legislature's placement of the registration provisions in the code of criminal procedure, in notifying those persons who are newly convicted of sex offense crimes of the applicability of the registration provisions, or in imposing a regulatory disability upon sex offenders to register. However, the focus of ASORA on sex offenders and not at an activity from which the offender should be barred because of relevant past conduct is slight evidence of punitive intent and the registration requirements are in fact a form of post-incarceration supervision.

Weighing all of the foregoing, the court concludes that the legislature did not act with punitive intent in enacting the registration provisions of ASORA.

b. Effect Prong

The court next considers the second part of the "intent-effects" test. Plaintiffs must show by the "clearest proof" that the registration requirement is "so punitive" in effect that it overcomes the non-punitive legislative intent. If they do so, the law must be considered an *ex post facto* Jaw in violation of the Constitution. In deter-mining whether the plaintiffs have met their burden, the court must consider the *Mendoza-Martinez* factors as set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). The court may consider whether:

> [1] the sanction involves an affirmative disability or restraint, [2] it has historically been regarded as a punishment, [3] it comes into play only on a finding of scienter, [4] its operation will promote the traditional aims of punishment-retribution and deterrence, [5] the behavior to which it applies is already a crime, [6] an alternative purpose to which it may rationally be connected is assignable for it, and [7] it appears excessive in relation to the alternative purpose assigned.

Id. (footnotes omitted). The Supreme Court recently emphasized that no one factor should be considered dispositive. *Hudson v. United States*, __ U.S. __ 118 S. Ct. 488, 494 (1997).

The first *Mendoza-Martinez* factor is whether the registration provisions involve an affirmative disability or restraint. The plaintiffs assert that ASORA amounts to an affirmative disability and restraint because requiring them to register deprives them of rights "to which they would otherwise have been entitled, and the deprivation of those rights is caused solely by the past criminal conviction."[18] The Ninth Circuit in *Russell* concluded without analysis that the Washington registration provisions did not impose an

---

[18] Clerk's Docket No. 107 at 61.

affirmative restraint or disability. *Russell*, 124 F.3d at 1089. This court has previously held that registration:

> does not affirmatively limit plaintiffs. It does not disqualify the registrant from any activity, personal or professional.

Rowe, 884 F. Supp. at 1378. Finally, as defendants point out, the registration provisions are not significantly more of an affirmative restraint than the provisions for securing an Alaska driver's license. The court concludes that the registration provisions do not impose an affirmative disability or restraint. This factor weighs in favor of a finding of no punitive effect.

The second *Mendoza-Martine* factor considers whether registration has historically been regarded as punishment. Plaintiffs contend that it has. However, this argument was directly addressed and dismissed in *Russell* when the court stated that registration provisions are "typically and historically a regulatory measure." *Russell*, 124 F.3d at 1089. Furthermore, that court went on to cite numerous cases where registration provisions have overwhelmingly been sustained as constitutional. In sum, this factor weighs in favor of a conclusion of no punitive effect.

The third A4endoza-Martinez factor asks the court to weigh if registration only comes into play on a finding of *scienter*. The plaintiffs contend that since the registration provisions apply only to those convicted of a crime, ASORA turns on a finding of *scienter*.

In rebuttal, defendants submit that registration is not based on a finding of *scienter*, but on a legislative finding that sex offenders have a "high risk of reoffending" and the conviction is simply the evidentiary basis for that finding. § 1, Ch. 41, SLA 1994. The requirement to register is based not only upon the *scienter* of the underlying crime but also upon the established high rate of recidivism by sex offenders.

Therefore, the court concludes that ASORA's registration provisions do not have a punitive effect because they are not based alone upon a finding of *scienter*.

In analyzing the fourth *Mendoza-Martinez* factor, the court must consider whether the registration provisions promote the traditional aims of punishment-retribution and deterrence. Plaintiffs assert that the registration pro-visions punish and deter crime.

However, as the defendants argue, the fact that registration has a deterrent effect (which the defendants con-cede the registration requirements may have) does not automatically render an otherwise regulatory sanction as punitive. *Kansas v. Hendricks*, 521 U.S. 346, 361. This is true because deterrence can serve both civil and criminal goals. Moreover, for a state action to be deemed retributive, it must amount to a deliberate imposition by the state of some measure intended to chastise, deter, or discipline. *Doe v. Kelley*, 961 F. Supp. 1105, 1111 (WD. Mich. 1997). Plaintiffs have put forth no evidence of a deliberate intent to discipline.

The existence of some deterrent effect does not make the registration provisions punitive in nature. Deterrence alone, particularly absent a showing at retribution, is insufficient without more to render the provisions as punitive.

The fifth *Mendoza-Martinez* factor considers whether the behavior to which the sanction applies is already a crime. Plaintiffs assert that since the registration provisions apply only to those persons who have been convicted of a criminal offense, it is conclusively established that the behavior to which ASORA applies is already a crime. However, the crime of failing to register under ASORA constitutes a separate offense and "[I]t is horn-book law that no *ex post facto* problem occurs when the legislature creates a new offense that includes a prior conviction as an element of the offense, as long as the other relevant conduct [failing to

register under ASORA] took place after the law was passed." *Russell*, 124 F.3d at 1088-89. Therefore, the court finds no evidence of a punitive effect after considering this factor.

The sixth *Mendoza-Martiuez* factor looks at the alter-native purposes to which the registration provisions may rationally be connected. Plaintiffs admit that there is an alternative purpose to the registration provisions—namely, the protection of the public from sex offenders. The plaintiffs disingenuously dispute the validity of this purpose. The evidence before the legislature and its findings strongly support the need for the protection of the public. Therefore, this factor supports a conclusion that the registration provisions do not have a punitive effect.

The seventh and final *Mendoza-Martinez* factor analyzes whether the registration provisions appear excessive in relation to the alternative purpose.

Plaintiffs argue that the registration provisions are excessive in relation to the purpose because there is no means of being relieved of the registration requirement. The plaintiffs exaggerate. A person who has only one conviction can be relieved from the registration requirements after 15 years. While 15 years is a long time, it is a sufficient amount of time in which to require a person to register and to ensure that the person is unlikely to register and to ensure that the person is unlikely to re-offend. This finding is consistent with *Russell* where the Ninth Circuit held that requiring less serious offenders to register for 10 or 15 years was not excessive given the state interest at stake. *Russell*, 124 F.3d at 1089. Therefore, the court concludes that this factor weighs in favor of finding no punitive effect.

In summary, the court has determined that: (1) the registration provisions do not impose an affirmative disability or restraint upon. the plaintiffs; (2) the registration provisions have not traditionally been considered to be

punishment; (3) the registration provisions are not based only upon a finding of *scienter*; (4) the deterrence factor in the registration provisions, absent a showing or retribution, was insufficient to render the registration provisions punitive; (5) the behavior to which the sanction (failure to register) applies is a separate offense from the underlying crime; (6) the evidence before the legislature and its findings strongly support the need for the protection of the public; and (7) the registration provisions are not excessive in relation to the purpose given the state interest (protection of the public from. the risk of re-offending sex offenders). Based on the foregoing, the court concludes that the plaintiffs have not shown by the clearest proof that the registration provisions are so punitive as to negate the legislature's non-punitive intent. Therefore, the registration provisions do not constitute punishment violative of the *ex post facto* clause. Defendants' motion for summary judgment on plaintiffs' *ex post facto* claim as it pertains to the registration requirements is granted. Plaintiffs' cross-motion for summary judgment is denied.

2. Notification Provisions

a. Intent

The court must consider whether the legislature intended the notification provisions to be punitive by looking to the declared purpose of the legislature as well as the construction and design of the notification provisions. The legislative findings make plain that the "release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety." § 1, Ch. 41 SLA 1994. This suggests a regulatory, not a punitive purpose.

Plaintiffs urge three reasons why the construction and design of the notification provisions should be held to evince punitive intent on the part of the Alaska Legislature. First, plaintiffs contend that the notification provisions are located in the Alaska criminal code; thereby evidencing a punitive

intent. Plaintiffs are wrong. The notification provisions of ASORA, AS 18.65.087, are codified in the Health, Safety; and Housing Code. Therefore, it cannot be said that the placement of the notification provisions within the code establishes a punitive intent.

Second, plaintiffs assert that since the legislature amended the criminal law by making the public notification requirements part of any plea agreement and part of any sentence imposed by the sentencing court, it evidences the legislature's intent to enact a punitive law. However, as is more fully discussed *supra* under the registration provisions, notifying persons who are convicted of sex offense crimes that they will be subject to public notification as a result of their conviction is the appropriate and fair thing to do.

Third, plaintiffs submit that an objective intent to establish a criminal statutory scheme is established because ASORA has insufficient limitations on public notification. Without specific limitations on how, when, and what information is released to the public, the release of all information on all offenders evidences an intent to impose punishment.

This argument requires some scrutiny. In *Russell*, the Ninth Circuit found that Washington's law which had stringent restrictions[19] on the release of registration information was not punitive because "[a] law designed to punish an offender would not contain strict limitations on notification." 124 F.2d at 1091. As the plaintiffs point out, ASORA contains no limitations on notification, Rather than limit notification to a specific geographic area like Washington does, under ASORA, the information has been published on the "modern

---

[19] Under Washington law, notification occurs only when the release of information is necessary for public protection. The notification occurs two weeks in advance of an offender's release from prison to allow time for the community to prepare for the release, ASORA does not have these protections.

day soap-box"[20] for the entire world to view. Second, under the Washington law public notification is not automatic like it is in Alaska. In Washington an individual determination is made to ascertain whether a sex offender poses a threat to the community. In Alaska, all sex offenders are subject to public notification regardless of their proclivity for re-offending and their level of threat to the community.

Defendants rebut this argument in two ways. First, they assert that plaintiffs ignore the fundamental difference between the notification provisions of the Washington statute and ASORA—namely, that Washington provides for an affirmative notification, whereas ASORA allows passive disclosure. The impact of a government agent going door-to-door to inform residents that a sex offender is in their midst is very different and more intrusive than making public information available to those who want it. The passive disclosure required by ASORA is no more suggestive (and could be viewed as less suggestive) of a punitive intent than Washington law which imposes disclosure upon all in a given area irrespective of whether they need or care to move. Under the notification provisions of ASORA, only those who know that they can access such information and care to do so are aware of sex offenders in their midst.

Second, defendants submit that the plaintiffs have failed to establish that the extra-Alaska dissemination via the Internet contradicts the legislature's regulatory intent. However, ASORA does seem to cast a much wider net than is

---

[20] The United States Supreme Court recently compared the Internet to the. 18th century soap-box. The court held that the Internet allows a person to become a "town crier with a voice that resonates farther than it could from any soapbox." *Reno v. ACLU*, ___ U.S. ___, 117 S. Ct. 2329, 2344 (1977).

absolutely necessary. The fact that a statute is over-broad in some respects does not, without more, derogate from its non-punitive goals:

> The legislature is not required to act with perfect precision, and its decision to cast a net wider than what might be absolutely necessary does not transform an otherwise regulatory measure into a punitive sanction.

Pataki, 120 F.3d at 1253. Assuming a choice between affirmative publication to a narrower population and less intrusive publication of registration information to a wider population, only the most concerned of whom are likely to acquire actual knowledge of registration information, the legislative choice made by Alaska in ASORA does not appear punitive.

In summary, the legislative findings, the fact that the notification provisions are codified in the Health, Safety, and Housing Code, and the requirement that persons who are newly convicted of sex crimes must be told of the notification provisions do not evidence a punitive intent on the part of the legislature. Furthermore, the use of a broad but passive notification does not evidence a punitive intent by the legislature. Based upon the foregoing, the court concludes that the legislature did not intend the notification provisions of ASORA to be punitive in nature.

b. Effect

Plaintiffs submit that they have established by the clearest proof that the notification provisions are so punitive in effect that this court is prevented from viewing them as regulatory or civil in nature, regardless of the legislature's intent. The court must consider the *MendozaMartinez* factors in light of the notification provisions of ASORA.

First, plaintiffs submit that the notification provisions impose an affirmative disability or restraint on sex offenders because they provide broad public access to the information

with no prior determination of the need for the disclosure and no restrictions on use of the information. In support, plaintiffs refer the court to *Kansas v. Myers*, 923 P.2d 1024, 1041 (Kan. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 2508 (1997). In *Myers*, the Kansas Supreme Court concluded that the public disclosure pro-visions imposed an affirmative disability or restraint because unrestricted public access to the registered information leaves open the possibility that the registered offender will be subject to public stigma and ostracism. *Id.* The Ninth Circuit in *Russell* noted, however, that the court could not consider the possible "'vigilante' or illegal responses or citizens to notification." *Russell*, 124 F.3d at 1092. Therefore, the court finds that the public notification provisions do not impose an affirmative disability.

Second, plaintiffs argue that public notification pro-visions have historically been treated as punishment. The Ninth Circuit in *Russell* concedes that historical punishments such as "pillorying, branding, or the sanction described in Hawthorne's *The Scarlet Letter*" are similar to the public notification provisions of sex offender laws. *Russell*, 124 F.3d at 1091. Moreover, "[n]otification may well subject offenders to humiliation, public opprobrium, ostracism, and the loss of job opportunities." *Id.* at 1092. Yet the court noted that while punishment in the past often relied upon humiliation, humiliation alone does not constitute punishment because there must be an intent to punish. *Id.* The court went on to conclude that give Washington's restrictions on disclosure, there was no intent to punish; thus, no 'clear proof' of an overwhelming punitive effect. *Id.* Under ASORA, access to registration information is broad, but it is a passive form of notice. The information is available to those who need and care to inquire, and this too fails to constitute clear proof of an overwhelming punitive effect.

The court concludes that even though the public notification provisions may humiliate sex offenders, the provisions

do not constitute punishment since there has been no showing of an intent to punish.

The third *Mendoza-Martinez* factor asks the court to consider if the notification provisions only come into play on a finding of *scienter*. The plaintiffs contend that since the notification provisions apply only to those convicted of a crime, ASORA turns on a finding of *scienter*. In rebuttal, defendants submit that, like the registration pro-visions, the notification provisions are not based on a finding of *scienter*, but on a legislative finding that sex offenders have a "high risk of reoffending" and the conviction Is simply the evidentiary basis for that finding. § 1, Ch. 41, SLA 1994. The public notification provisions are based not only upon the *scienter* of the underlying crime but also upon the established high rate of recidivism by sex offenders. The court concludes that ASORA's notification provisions do not have a punitive effect because they are not based alone upon a finding of *scienter*.

Fourth, the plaintiffs do not expressly address the retribution and deterrence factor in light of the notification provisions. But the defendants contend that the deterrent effect of disclosure is little different from the deterrent effect of registration. Single disclosure involves only information that is mostly available from other public sources—voter records and criminal records—the defendants argue that it would be illogical to conclude that disclosure becomes retributive simply by making the information more readily available to the public.

Affirmative notification like that in Washington clearly has a deterrent effect. The court is unconvinced that creating a repository of information regarding sex offenders and making that information available to the public under Alaska law will be as effective a deterrent. In *Russell*, the Ninth Circuit found that while the Washington notification provision had a deterrent effect, it did not implicate the other goal of

punishment (retribution) because "it [does not] label [] the offender as more culpable that before (though his or her culpability may be more widely publicized)." *Russell*, 124 F.3d at 1091. Thus the court finds that while the Alaska notification provisions may serve as a deterrent, they do not have a retributive effect since the notification provisions do not seek to punish but rather to make more readily available that which is already public information.

The fifth *Mendoza-Martinez* factor considers whether the behavior to which the sanction applies is already a crime. The parties as well as the court in *Russell* do not directly address this factor. However, under Alaska law, the notification provisions apply only to those persons who have been convicted of a criminal offense. Therefore, the court concludes that the [sic] since the sanction of public notification applies to those already convicted of a crime, this factor weighs in favor of a finding of punitive effect.

The sixth *Mendoza-Martinez* factor looks at the alter-native purposes to which the notification provisions may rationally be connected. Plaintiffs admit that there is an alternative purpose to the notification provisions, namely, the protection of the public. Providing access to a registry of sex offenders does allow the public to protect itself if it so chooses; thus, it appears rationally related. The court therefore finds that because the alternative purpose (protection of the public) is served through the Alaska notification provisions. there is no punitive effect.

Finally, the parties consider whether the notification provisions appear excessive in relation to the alternative purpose.

Plaintiffs assert that the notification provisions are excessive in relation to serving the purpose of public notification. In support, they rely upon *Russell* where the Ninth Circuit found that the Washington act was not excessive because it was narrowly tailored and strictly limited so as to

achieve the goals of protecting the community from persons who had been determined to pose an actual threat. *Russell*, 124 F.3d at 1089-1091. In response, the defendants argue that the Washington safe-guards are necessary only because the Washington statute requires that state agents actively go into a community and notify citizens of the presence of certain sex offenders. The court finds that if it is not excessive to knock on people's doors, then compiling information under ASORA and making the collected data more readily available to those who need and care to know cannot be considered excessive.

In summary, after analyzing the *Mendoza-Martinez* factors in light of Alaska's public notification provisions, the court concludes that the following indicates a finding that the public notification provisions of ASORA do not have a punitive effect because: (1) providing unrestricted access to the information does not impose an affirmative disability; (2) even though the public notification provisions may humiliate sex offenders, they do not constitute punishment since there has been no showing of an intent to punish; (3) the provisions are not based alone upon a finding of *scienter*; (4) while the provisions serve as a deterrent, they are not retributive; (5) protection of the public is served by the public notification provisions; and (6) the provisions are not excessive in relation to serving the purpose of protecting the public. The ASORA notification provisions have application only to those convicted of a crime.

Based upon the foregoing, the court finds that the plaintiffs have not established by the *clearest proof* that ASORA's notification provisions are so punitive in effect as to overcome the non-punitive, express legislative intent. Therefore, defendants' motion for summary judgment on plaintiffs' *ex post facto* claim as it pertains to the notification provisions is granted. Plaintiffs' cross-motion for summary judgment on this subject is denied.

B.

Impairment of Contracts Clause—
Violation of Article I, Section 10

Plaintiffs also move for summary judgment contending that retroactive application of ASORA is barred by Article I, Section 10, of the United Stat3es Constitution. Plaintiffs assert tjat ASORA, by requiring them to register as sex offenders and by providing public disclosure of information. Violates the constitutional prohibition of impairment of contracts since their plea agreements did not contain such requirement.

The parties agree, without citing any authority, that the test for determining whether ASORA impairs the Does' plea agreements is whether ASORA materially altered or modified the contract to the extent that a party to the contract is deprived of rights accruing under the original agreement. The parties also seem to agree that this is an issue of Alaska law, not federal law. But the defendants contend that because it is a question of Alaska law, this court lacks jurisdiction to consider plaintiffs' claim because it is barred by the Eleventh Amendment.

The appropriate test for use by this court is not set forth or argued by either of the parties. Article I, Section 10, of the United States Constitution provides in pertinent part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." although the language of the Contracts Clause appears to be absolute, the Supreme Court has recognized that:

> The interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion f the . . . good of the public, through contracts previously entered into between individuals may thereby be effected.

Manigault v. Springs, 199 U.S. 473, 480 (1905).

The three-part inquiry established by the Supreme Court to determine whether a state law violates Article I, Section 10, requires this court to consider whether: (1) the state law has operated as a substantial impairment to the rights owing to a plaintiff under a contractual relationship; (2) assuming a substantial impairment, the state has demonstrated that a significant and legitimate public purpose justifies the regulation; and (3) the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

For purposes of this discussion, the court assumes, without deciding, that the first *United States Trust Co.* factor (impairment of contract rights) is established. Even if ASORA is considered as a substantial impairment, ASORA was enacted in response to the sexual abuse crisis that exists in Alaska and is intended and designed to protect the public. This is clearly a significant and legitimate public purpose justifying the regulation. Finally, and as discussed at length above, the registration and notification provisions are reasonable and rationally related to the purpose of protecting the public from sex offenders.

Based upon the foregoing, the court concludes that ASORA does not violate Section 10 of Article I of the United States Constitution. Therefore, defendants' motion for summary judgment on this issue is granted, and plaintiffs' cross-motion is denied.

C.

Right of Privacy

Plaintiffs assert that the public disclosure provisions of ASORA violate the right to privacy under the United States Constitution and under the Alaska Constitution. According to Doe I and Doe II, public notification infringes upon their

right to "personal privacy and dignity."[21] Jane Doe alleges that public notification infringes upon her right to privacy because it causes "public intrusion into the martial relationship and causes harm to the wife and family of offenders required to register."[22] Because the privacy rights of Doe I and Doe II differ from those asserted by Jane Doe and because of concerns over whether Jane Doe even has standing to assert her claims, the court addresses these issues individually.

1. Privacy Claims under the United States Constitution

a. John Doe I and John Doe II

In *Whalen v. Roe*, the United States supreme court recognized that the Constitution protects two types pf privacy interests: (10 "the individual interest in avoiding disclosure of personal matters" and (2) "the interest in independence in making certain kinds of important decisions." 429 U.S. 589, 599-600 (1977). Plaintiffs allege that state dissemination of criminal history information, current addresses, current place of employment, and "state sponsored intrusions into the family home by neighbors and vigilantes"[23] implicates both types of privacy recognized in *Whalen* because it constitutes the disclosure of personal Matters and affects the plaintiffs' independence in making certain kinds of decisions such as where to live and work and, in the case of Jane Doe, whom to marry.

Defendants contend that the information required as part of the notification process is already a matter of public record and that which is in the public record is not protected by any federal right to privacy; therefore, they are entitled to judgment as a matter of law. *McNally v. Pulitzer Publishing*

---

[21] Clerk's Docket No. 107 at 31.

[22] Clerk's Docket No. 107 at 32.

[23] *Id.* at 31.

Co., 532 F.2d 69, 77-78 (8th Cir. 1976), *cert. denied*, 429 U.S. 855 (1976). Moreover, the defendants assert that a person does not have a reasonable expectation of privacy as to his physical characteristics, including one's likeness. *United States v. Dionisio*, 410 U.S. 1, 7 (1973).

Plaintiffs put forth several arguments supporting their motion for summary judgment on the grounds that ASORA goes beyond merely releasing information pertaining to Doe I and Doe II's conviction, matters of public record, and their photos, thus violating their right to privacy.

First, under the public notification provisions, a person's current address and place of employment which is not part of the criminal public record is disclosed. In fact, as the plaintiffs point out, John Doe I and Doe II's criminal files which are over ten years old contain neither their current home addresses nor their places of employment. Therefore, Doe I and Doe II's addresses and places of employment are not part of the public record. They refer the court to *United State Department of Defense v. FLRA*, 510 U.S. 487 (1994), where the Supreme court held that the federal Privacy Act and the Freedom of Information Act prohibited federal employers from disclosing employees' addresses without their consent because a disclosure of home addresses could lead to the intrusion or misuse of that information, thereby constituting a violation of the right to privacy. Finally, the Dies distinguish *Russell* and point out that ASORA has none of the protections which led the Ninth Circuit to find that the public notification provisions of the Washington registration act did not violate the right of privacy because the act provided due process to the offenders before the information could be release, not all offenders fell within the public notification provisions, and the information disseminated was severely limited. *Russell*, 124 F.3d at 1094. The Washington law only provided that the general vicinity where the offender resided be released, not the specific address as is done under

ASORA. The Ninth Circuit found that the fact that an offender's exact address was not released was important and stated that the Washington act did not violate the right of privacy because "the collection and dissemination of information is carefully designed and narrowly limited." *Id.* at 1093.

The defendants rebut on four grounds. First, they contend that *Russell*—which found no violation of the right to privacy—controls. Moreover, the court in *Russell* cited *Johnson v. Sawyer*, 47 F.3d 716, 732-33 (5th Cir. 1995) (*en banc*), for its discussion of the common law invasion of privacy. *Johnson* noted that neither street address nor job title could be characterized as private or highly intimate or embarrassing facts about a person's private affairs such that publication would be highly objection-able to a person of ordinary sensibilities. 47 F.3d 716 at 733. Therefore disclosure of a sex offender's street address or employment should not be considered information protected by the right to privacy under the United State Constitution.

Second, defendants contend that no personal information (information that is private) is disclosed under ASORA because all of the information disclosed under ASORA is available in public records, and they point to the fact that the plaintiffs' addresses are available publicly through voter registration rolls and Alaska Permanent Fund Dividend records.[24] Therefore, defendants assert, Doe I and Doe II have no reasonable expectation of privacy in that which they knowingly expose to the public. The defendants distinguish *Department of Defense v. FLRA* on the grounds that the privacy interest recognized in this case is rooted in federal statutes, not the federal constitution Finally, defendants contend that the Alaska Legislature found that a sex offender's privacy interest is "less important than the government's interest in public safety" and that "release of certain infor-

[24] Although they do not provide proof of this.

mation about sex offenders to . . . the general public will assist in protection the public safety." § 1, Ch. 41, SLA 1994. This legislative determination, under *Nestor*, 363 U.S. at 617, is subject to attack only upon the basis that it is irrational, which the court finds the plaintiffs have not shown.

This court previously rejected plaintiffs' privacy argument, holding that the right to privacy "does not attach to matters already within the public domain." *Rowe*, 884 F. Supp. at 1384. Here, the court is persuaded by defendants' arguments.

Because the information subject to disclosure is either a matter of public record or is not "highly intimate," the court concludes that the public notification provisions of ASORA do not violate Doe I and Doe II's right to privacy under the United States Constitution. Therefore, defendants' motion for summary judgment on Doe I and Doe II's claims that the public notification provisions of ASORA violate the right to privacy under the United States Constitution is granted. Plaintiffs' cross-motion on this issue is denied.

b. Jane Doe

Jane Doe asserts a claim based upon 42 U.S.C. § 1983. In order to maintain an action under 42 U.S.C. § 1983 she must establish: (1) that the defendants deprived her of a right secured by the Constitution and laws of the United States, and (2) that the defendants deprived her of this right under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

Jane alleges two injuries in fact: (1) violation of her right to privacy under the United States Constitution, and (2) violation of due process because of a deprived liberty interest, *i.e.*, her state granted right of privacy. The crux of Jane Doe's claim is that she will be injured by release of the information regarding her husband and by release of her home address. She has not shown any actual injury to date, only because an injunction has been in effect since the inception of this

lawsuit. Plaintiff refers the court to sealed exhibits which show that family members or registered sex offenders have suffered harm and been stigmatized.[25] In response, defendants contend that Jane Doe lacks standing to raise such a claim and, even is she has standing, that she is not entitled to summary judgment.

The defendants argue that Jane Doe lacks standing to challenge ASORA because she is not subject to ASORA. She is not a sex offender; she is married to one. Moreover, her affidavit does nothing more than speculate that she "will be seriously harmed" by disclosure of her husband's conviction as a sex offender. Finally, they note that the harm alleged to have been suffered by family members of registered sex offenders is really an unavoidable consequence that resulted from a criminal conviction.

The assertion of a loss of constitutional rights constitutes an injury for purposes of standing. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Therefore, Jane Doe, who is asserting a violation of her constitutional rights caused by ASORA, has standing to proceed although she is not a sex offender. *Jane Doe v. Borough of Barrington*, 729 F Supp. 376 (D. N.J. 1990).

Plaintiff moves for summary judgment on her claims. She urges that her expectation of privacy, unlike that of Doe I and Doe II, has never been lowered as a result of criminal conduct and that the information which is released as part of ASORA's notification provisions and which is not part of the public record causes public intrusion into the marital relationship and causes harm to the wife and family of offenders required to register.

Under ASORA, the defendants do not disclose any private information pertaining directly and uniquely to Jane Doe.

---

[25] Clerk's Docket No. 101, Exhibits 12, 13, 15 & 16.

Moreover, this situation is distinguishable from that presented in *Doe* v. *Borough of Barrington*, 729 F. Supp. 376 (D. N.J. 1990), where the court found that the government violated the privacy rights of a wife when it publicly disclosed that her husband had AIDS because "[t]he stigma of AIDS extends to all family members whether or not they actually have the disease." *Doe*, 729 F. Supp. at 386. Any stigma of being a sex offender extends only to the sex offender and not to the sex offender's family because being a sex offender is not an infectious disease which could conceivably be passed to one's spouse. Therefore, the court concludes that while Jane Doe has standing to assert a violation of her constitutional right to privacy, she has not come forward with any evidence tending to show that her several or separate privacy rights have been violated. Defendants' motion for summary judgment as to Jane Doe's civil rights claim is granted, and Jane Doe's motion for summary judgment is denied.

2. Privacy Claims under the Alaska Constitution

The court next turns to Doe I and Doe II's claim that ASORA's public notification provisions violate the express guarantee of a right to privacy afforded by the Alaska Constitution. In their cross-motion for summary judgment, plaintiffs assert that they are moving for summary judgment on this issue. Defendants rebut, arguing that this court lacks subject matter jurisdiction to hear this claim based upon Eleventh Amendment immunity.[26]

[26] Eleventh Amendment immunity does not extend to suits seeking declaratory and injunctive relief against state officers in their individual capacities for their failure to protect federal statutory or Constitutional rights. Therefore, the court can hear plaintiffs claims base on violations of federal laws.

Plaintiffs submit that defendants are "belatedly recharacterizing the [plaintiffs'] claims to be claims based on a violation of state law, which they are not."[27] Rather, plaintiffs say that they are not directly asserting state law claims arising under the Alaska Constitution. Plaintiffs' assertion is contradicted by their amended complaint. Plaintiffs expressly title Count III of their amended complaint "Pendant State Law Claims for Declaratory Judgment"[28] which includes an allegation that ASORA violates plaintiff's expectation of privacy protected by Article I, Section 22, of the Alaska Constitution.

In their Count, III, plaintiffs have plainly asserted against the defendants a state claim. State law claims for violation of a right to privacy arising under the Alaska Constitution cannot be considered by this court because they are barred by the Eleventh Amendment.[29] *Pennhurst State School & Hospital v. Haldennan*, 465 U.S. 89, 121 (1984). Defendants are granted summary judgment as to plaintiffs' state law claims.

D.

Due Process

The United States Constitution protects persons from the deprivation of liberty without due process of law. U.S. Const. Amend. XIV. Doe I and Doe II contend that ASORA deprives them of due process of law in violation of the Fourteenth Amendment of the United States Constitution on the following grounds: (1) because the United State Constitu-

---

[27] Plaintiffs' Reply Memorandum at 3, Clerk's Docket No. 113.

[28] Clerk's Docket No. 10.

[29] This also applies to plaintiffs' claims that ASORA violates the Alaska Constitution because it constitutes a denial of due process inconsistent with Article 1, Section 7, an *ex post facto* law prohibited by Article I, Section 15, and a violation of the equal protection clause guaranteed by Article I, Section 12.

tion grants them a right to privacy, a liberty interest, which is violated by the release of information under the notification provisions of ASORA without sufficient due process; (2) the Alaska Constitution expressly guarantees a right of privacy, therefore a liberty interest exists and ASORA violates the Due Process Clause of the United States Constitution by infringing upon that liberty interest;[30] and (3) the Alaska Constitution grants a right to rehabilitation and reintegration which is abrogated by the state attaching conditions on that reintegration and by the state's broadcasting private informa tion to the world which interferes with the registrant's ability to work, seek housing, and to interact with other members of the community. The parties cross-move for summary judgment on the claims.

Because this court found that none of the plaintiffs have a privacy interest protected by the United State Constitution, the court finds no liberty interest at stake. This is consistent with *Russell*, 124 F.3d at 1094. There-fore, defendants' motion for summary judgment on this issue is granted and plaintiffs' cross-motion is denied.

The crux of plaintiffs' second ground for asserting a violation of the Due Process Clause of the United States Constitution is that the Alaska Constitution expressly guarantees a right of privacy, therefore, a liberty interest exists and ASORA violates the Due Process Clause of the United States Constitution by infringing upon that liberty interest.

Defendants dismiss this argument on the basis that plaintiffs are trying to disguise a state law claim barred by the Eleventh Amendment and defendants elect not to address the argument at all. However, an alternative way for litigants to bring state law claims into federal court is to argue, as plaintiffs have done, that the state law, here the Alaska Constitution, gives rise to a liberty interest protected by

---

[30] Jane Doe also asserts this claim.

the Due Process Clause. Edwin Chemerinsky, *Federal Jurisdiction,* § 7.5.

According to the plaintiffs, this creates a federally protected liberty interest. In support, they refer to two Alaska Supreme Court cases which concluded that the right to privacy is liberty interest. *See Breese v. Smith*, 501 P.2d 159 (Alaska 1972), and *Ravin v. State*, 537 P.2d 494 (Alaska 1975). The crux of the plaintiffs' claim is that the legislature has done what the voters had intended Article I, Section 22, to prevent. By releasing sex offenders' home addresses, ASORA invaded the offenders' right to live peaceably in their homes, their right to association with family and friends, and their right to work. Moreover, this invasion of the right to privacy is done without notice and opportunity to be heard and without first making a determination of the need for each disclosure by finding that the individual subject to disclosure actually presents a threat to the public. Thus, plaintiffs posit, ASORA denies due process.

The court in *Russell* found no due process violation because they found no violation of the right to privacy. However, the court in *Russell* was confronted only with a challenge to the United States Constitution. The situation in Alaska may warrant a different result. First, the Alaska Constitution, unlike the United States Constitution, expressly provides for a right of privacy.

Under Alaska law, this gives rise to a liberty interest. Further, the Washington law provides for a notice and opportunity to be heard before public disclosure is made.

The test for determining what process is due an individual subject to a possible deprivation of a protected liberty interest is set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The court must consider: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used and

the probable value, if any, of additional or substitute procedural safeguards: and (3) the defendant's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. 424 U.S. at 335. The parties provide the court with no appropriate analysis of the facts of this case using the test set forth in *Mathews*. Therefore, plaintiffs' motion for summary judgment on this issue is denied with leave to renew. Defendants' motion for summary judgment on the grounds that plaintiffs' due process claim is barred by the Eleventh Amendment is denied.

Plaintiffs' third grounds for asserting a violation of the Due Process Clause of the United States Constitution is that the Alaska Constitution grants a right to rehabilitation and reintegration which is abrogated by the defendants' attaching conditions on that reintegration and by the state's release of information which interferes with the registrant's ability to work, seek housing, and to interact with other members of the community.[31]

Article I, Section 12, of the Alaska Constitution has been interpreted as granting to an offender the right to rehabilitate and reintegrate with all those rights possessed by any other member of the public:

> the public is not the sole beneficiary of this constitutional requirement. The constitution speaks of penal administration being based on the "principle of reformation." Reformation relates to something being done to rehabilitate the offender into a noncriminal member of society. True, society will benefit from this, but so will the offender since, to the extent that he is rehabilitated into a law-abiding person, his inherent dignity as a

---

[31] Defendants again elect not to address this argument and instead rely upon the fact that plaintiffs are merely disguising a state law claim barred by the Eleventh Amendment.

> human being will be enhanced. He will be the object of respect, rather that of fear and loathing by his fellow citizens, and to that extent, will benefit from the sense of personal satisfaction enjoyed by those who live decent lives, unsullied by disobedience and rebellion against the laws by which we govern ourselves in a peaceful and tranquil society.

Abraham v. Alaska, 585 P.2d 526, 531 (Alaska 1978).

Therefore, the gravamen of plaintiffs' argument is that Doe I and Doe II had a federally protected right to meaningful access to rehabilitation and to full integration which includes the right to unconditionally reenter society with all civil rights restored and to then live a normal life and not be the object of fear or loathing by fellow citizens. ASORA allegedly violates plaintiffs' reentry rights from a federal constitutional perspective by placing conditions on that reentry by requiring persons convicted of sex offenses to register with the authorities and to periodically report to the authorities as if they were on court probation without an opportunity to be heard.

Because the parties again failed to provide the court with an analysis of this argument and the pertinent facts in this case in light of the framework established by the United State Supreme Court in *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), the court denies plaintiffs' motion for summary judgment with leave to renew.

E.

Fourteenth Amendment—Equal Protectipn
and
Fourth Amendment—Search and Seizure

Although plaintiffs contend they are moving for summary judgment on all of their claims, plaintiffs put forth no discussion of their claim that ASORA violates the equal protection clause of the Fourteenth Amendment. Plaintiffs also

fail to provide a discussion of their claim that the finger-printing and photographing requirements of ASORA violate the Fourth Amendment of the United State Constitution.

A motion for summary judgment must contain a "brief statement of points and authorities relevant to the relief requested." D. Ak. L.R. 7.l(a)(2). The failure to include proper materials in support of a motion subjects the motion to summary ruling by the court *sua sponte*. D. Ak. L.R. 7.1(d). Therefore, plaintiffs' motion for summary judgment on these two constitutional issues is denied ¼rith leave to renew upon the proper filing of an applicable statement of points and authorities pertaining to them.

CONCLUSION

Based upon the foregoing: (I) defendants' motion for summary judgment on plaintiffs' *ex post facto* claims is granted, and plaintiffs' cross-motion for summary judgment is denied; [32] (2) defendants' motion for summary judgment on plaintiffs' Contracts Clause claim is granted, and plaintiff's cross-motion for summary judgement is denied;[33] (3) defendants' motion for summary judgment on plaintiffs' federal right to privacy claims is granted, and plaintiffs' cross-motion for summary judgment is denied;[34] (4) defendants' motion for summary judgment on plaintiffs' Count III, pendant state law claims, is granted, and plaintiffs' cross-motion for summary judgment is denied;[35] (5) defendants' motion for summary judgment on plaintiffs' federal due process claims is granted as to plaintiffs' federal privacy interest claims, but denied as to plaintiffs' claims of federal due process based upon state privacy interests and state right to rehabili tation and

---

[32] *See* pages 7 through *32, infra.*

[33] *See* pages 32 through 34, *infra.*

[34] *See* pages 34 through 42, *infra.*

[35] *See* pages 42 through 43, *infra.*

reintegration, and plaintiffs' cross-motion for summary judgment is denied with leave to renew as to federal due process based upon state rights;[36] (6) plain-tiffs' motion for summary judgment on their Fourteenth Amendment (equal protection) and Fourth Amendment (search and seizure) claims are denied with leave to renew.[37] If no such renewed motion(s) is filed on or before April 30, 1999, the court will deem plaintiffs to have abandoned these claims, and the clerk of court shall enter judgment dismissing plaintiffs' complaint with prejudice and vacating the preliminary injunction.

DATED at Anchorage, Alaska, this 31 day of March, 1999.

/s/ H. Russel Holland
H. RUSSEL HOLLAND, Judge
District of Alaska

---

[36] *See* pages 43 through 48, *infra.*

[37] *See* pages 48 through 49, *infra.*

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

[Filed August 12, 1999]

No. A94-0206-CV (HRH)

JOHN DOE I, *et al.*,

Plaintiffs,

vs.

RONALD O. OTTE,
Commissioner, *et al.*,

Defendants.

ORDER

Cross-Motions for Summary Judgment

Plaintiffs move for summary judgment on their claim that the Alaska Sex Offender Registration Act ("ASORA") violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[1] Defendants oppose and cross-move for summary judgment.[2] Oral argument has not been requested and is deemed unnecessary.

Facts

Plaintiffs are two convicted sex offenders, John Doe I and John Doe II, and Jane Doe, wife of John Doe I. They are challenging Alaska's Sex Offender Registration Act ("ASORA"), AS 12.63.010-12.63.100 and AS 18.65.087.

---

[1] Clerk's Docket No. 119.

[2] Clerk's Docket No. 123.

Defendants are Ronald L. Otte, Commissioner of the Department of Public Safety for the State of Alaska, and Bruce M. Bothelo, Attorney General for the state of Alaska. They are named in both their official and individual capacitites.

On March 31, 1999, the court granted defendants' motion for summary judgment[3] on all but two issues.[4] The plaintiffs' cross-motion[5] was denied, but they were granted leave to renew their federal due process claims that were based on alleged violations of their state-created constitutional rights to privacy and rehabilitation.[6] These claims are now the subject of the parties' pending cross-motion s for summary judgment.

Discussion

Plaintiffs move for summary judgment asserting that ASORA violates the Fourteenth Amendment, Due Process Clause, of the United States Constitution because it invades important liberty interests granted by the Alaska Constitution. The defendants cross-move for summary judgment. The parties acknowlede that resolution of these cross-motions would require a determination of whether ASORA violates certain provisions of the Alaska Constitution: the right to privacy granted by article I, section 22, the right to travel, the

---

[3] Clerk's Docket No. 95.

[4] Clerk's Docket No. 118.

[5] Clerk's Docket No. 107.

[6] Clerk's Docket No. 118, at 48-49. Plaintiffs were also granted leave to renew two additional claims which they expressly abandon in this motion for summary judgment:

> whether ASORA violates the Does' Fourth Amendment right to be free from unreasonable search and seizure, and whether ASORA violates the Equal Protection Clause of the Fourteenth Amendment. Memorandum of Points and Authorities at 2, Clerk's Docket No. 119.

right to be let alone, and the right to be free from governmental control granted by article I, section 1; and the right to rehabilitation and reintegration guaranteed by article I, section 12.

At the time the parties' cross-motions were filed, the state courts of Alaska had not yet considered whether ASORA violated the Alaska Constitution and defendants urged this court to certify the issue to the Alaska Supreme Court. On July 23, 1999, the Alaska Court of Appeals issued its decision in *Patterson v. State*, __ P.2d __I No. A-6718, slip op. 1641 (Alaska App., July 23, 1999). In *Patterson*, the Alaska Court of Appeals held that ASORA does not violate the right to privacy under article I, section 22, of the Alaska Constitution.[7] *Id.* at 19-20. The court also held that ASORA did not violate the substantive due process clause because it does not infringe upon a sex offender's right to travel, obtain employment, and personal safety. *Id.* at 21.

While the court in *Patterson* did not address the right to rehabilitation or reintegration, the court noted that Patterson had not show liberty interest." *Id.* at 21. Even assuming a liberty interest existed arising from the right to rehabilitation and reintegration, a statute violates substantive due process under Alaska law only if the statute has no reasonable relationship to a legitimate governmental purpose. *Id.* at 21-22. Since the registration and notification provisions according to *Patterson* are rationally related to the legitimate purpose of ensuring public safety, *Id.* there is no violation of substantive due process. Moreover, the right to rehabilitation and reintegration is coupled with other important

---

[7] Plaintiffs assert that Alaska law gives them a right to be left alone and to be free of government control. To the extent that there is a right to be left alone, it is a subset of the plaintiffs' Article I, Section 22, right to privacy under the Alaska Constitution. ASORA does not violate plaintiffs' right to be left alone. Article I, Section 1, does not contain a right to be free of government control.

constitutional considerations in article I, section 12, of the Alaska Constitution which provides:

> Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender the rights of victims of crimes, restitution from the offender, and the principle of reformation.[8]

Thus in making provision for reformation of persons such as Doe I and II, the Alaska Legislature was bound to consider and make provision for the protection of the public as well as reformation of criminals. Plaintiffs have not shown that ASORA fails to strike a proper balance between reformation of sex offenders and protection of the public.

The Alaska Court of Appeals determined the ASOBA does not violate the Alaska Constitution; therefore, there is no state granted liberty interest which can be protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Although the issues raised by Jane Doe were not before the Alaska Court of Appeals in *Patterson*, defendants are entitled to summary judgment on Jane Doe's claim that ASORA violates her right to privacy granted by the Alaska Constitution. If Doe I does not have a right to privacy afforded by the Alaska constitution, Jane Doe's claim must fall also because she has made no showing that the provisions of ASORA were directed towards her, and under ASORA the defendants do not disclose any private information pertaining directly or uniquely to Jane Doe.

---

[8] Article I, section 12, so reads today. When this suit was commenced, that section read:

> Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

CONCLUSION

Based on the foregoing, plaintiffs' motion for summary judgment is denied and defendants' cross-motion for summary judgment in granted. The clerk of court shall enter judgment dismissing plaintiffs' complaint with prejudice.

DATED at Anchorage, Alaska, this 12 day of August, 1999.

/s/ H. Russel Holland
H. RUSSEL HOLLAND, JUDGE
District of Alaska

APPENDIX C

Alaska Statute 11.41.434 (1983) provided:

(a) An offender commits the crime of sexual abuse of a minor in the first degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in sexual penetration with another person; or

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age and who

(A) is entrusted to the offender's care by authority of law; or

(B) is the offender's son or daughter including an illegitimate or adopted child, or a stepchild.

(b) Sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55.

Alaska Statute 11.51.100(a) provides:

A person commits the crime of endangering the welfare of a child in the first degree if, being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person

(1) intentionally deserts the child in a place under circumstances creating a substantial risk of physical injury to the child;

(2) leaves the child with another person who is not a parent, guardian, or lawful custodian of the child knowing that the person

(A) is registered or required to register as a sex offender under AS 12.63 or a law or ordinance in another jurisdiction with similar requirements;

(B) has been charged by complaint, information, or indictment with a violation of AS 11.41. 410–11.41.455 or a law or ordinance in another jurisdiction with similar elements; or

(C) has been charged by complaint, information, or indictment with an attempt, solicitation, or conspiracy to commit a crime described in (B) of this paragraph; or

(3) leaves the child with another person knowing that the person has previously physically mistreated or had sexual contact with any child, and the other person causes physical injury or engages in sexual contact with the child.

Alaska Statute 11.56.840 provides:

(a) A person commits the crime of failure to register as a sex offender or child kidnapper in the second degree if the person knowingly fails to (1) register, (2) file the written notice of change of address, (3) file the annual or quarterly written verification, or (4) supply all of the information required to be submitted under (1)–(3) of this subsection, as required in AS 12.63.010.

(b) Failure to register as a sex offender or child kidnapper in the second degree is a class A misdemeanor.

Alaska Statute 11.81.250 provides:

(a) For purposes of sentencing under AS 12.55, all offenses defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping, are classified on the basis of their seriousness, according to the type of injury characteristically caused or risked by commission of the offense and the culpability of the offender. Except for murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping, the offenses in this title are classified into the following categories:

(1) class A felonies, which characteristically involve conduct resulting in serious physical injury or a substantial risk of serious physical injury to a person;

(2) class B felonies, which characteristically involve conduct resulting in less severe violence against a person than class A felonies, aggravated offenses against property interests, or aggravated offenses against public administration or order;

(3) class C felonies, which characteristically involve conduct serious enough to deserve felony classification but not serious enough to be classified as A or B felonies;

(4) class A misdemeanors, which character-istically involve less severe violence against a person, less serious offenses against property interests, less serious offenses against public administration or order, or less serious offenses against public health and decency than felonies;

(5) class B misdemeanors, which characteristically involve a minor risk of physical injury to a person, minor offenses against property interests, minor offenses against public administration or order, or minor offenses against public health and decency;

(6) violations, which characteristically involve conduct inappropriate to an orderly society but which do not denote criminality in their commission.

(b) The classification of each felony defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping, is designated in the section defining it. A felony under Alaska law defined outside this title for which no penalty is specifically provided is a class C felony.

(c) The classification of each misdemeanor defined in this title is designated in the section defining it. A misdemeanor under Alaska law defined outside this title for which no penalty is provided is a class A misdemeanor.

Alaska Statute 28.10.505 provides:

(a) Notwithstanding AS 44.99.300 and except as provided in this section, the department may not disclose personal information contained in motor vehicle records maintained by the department under this chapter.

(b) Personal information shall be disclosed for use in connection with matters of motor vehicle or driver safety or theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles and dealers by motor vehicle manufacturers; and removal of nonowner records from the original owner records of motor vehicle manufacturers as required by federal law.

(c) Personal information may be disclosed if the requesting person demonstrates, in a form and manner the department prescribes, that the requesting person has obtained the written consent of the person who is the subject of the information.

(d) Personal information may be disclosed by the department upon proof of the identity of the person requesting a record and representation by the requesting person that the use of the personal information is strictly limited to one or more of the following uses:

(1) for use by a government agency, including a court or law enforcement agency, in carrying out its functions, or a private person or entity acting on behalf of a government agency in carrying out its functions;

(2) for use in the normal course of business by a legitimate business or an agent, employee, or contractor of the business, but only

(A) to verify the accuracy of personal information submitted by an individual to the business or an agent, employee, or contractor of the business; and

(B) if the information submitted is not correct, to obtain the correct information, but only for the purposes of preventing fraud by pursuing legal remedies against, or recovering on a debt or security interest against, an individual;

(3) for use in connection with a civil, criminal, administrative, or arbitration proceeding in a court or government agency or before a self-regulatory body, including service of process and the execution or enforcement of a judgment or court order;

(4) for use in research activities, or in producing statistical reports, if the personal information is not published, redisclosed, or used to contact an individual;

(5) for use by an insurer or insurance support organization, or by a self-insured entity, or an agent, employee, or contractor of an insurer, in connection with claims investigation activities, anti-fraud activities, rating, or underwriting;

(6) for use in providing notice to the owners of towed or impounded vehicles;

(7) for use by an employer or an agent or insurer of an employer to obtain or verify information relating to a holder of a commercial driver's license that is required under 49 U.S.C. 31101–31162 (Commercial Motor Vehicle Safety Act);

(8) for use in connection with the operation of private toll transportation facilities;

(9) for use in connection with a legitimate business operating under a contract with the department;

(10) for bulk distribution for surveys, marketing, or solicitations if the person who is the subject of the information has provided written consent to the release; and

(11) for any other purpose specifically authorized by law that is related to the operation of a motor vehicle or related to public safety.

(e) Personal information contained in an individual record may be disclosed, without regard to the intended use of the personal information, if the person who is the subject of the information has provided written consent to the release.

(f) In this section,

(1) "disclose" means to engage in a practice or conduct that makes available or makes known personal information contained in records of the department about a person to another person, organization, or entity by any means of communication;

(2) "individual record" means a record containing personal information about a designated person who is the subject of the record, as identified in a request for information;

(3) "personal information" means information that identifies a person, including a name, address, telephone number, and medical or disability information, but does not include information on vehicular accidents, driving—or equipment-

related violations, driver's license or registration status, or a zip code.

Alaska Statute 34.70.050 provides:

The Real Estate Commission established under AS 08.88.011 shall establish the form of the disclosure statement required by AS 34.70.010. The disclosure statement must include a provision that notifies transferees

(1) that they are responsible for determining whether a person who has been convicted of a sex offense resides in the vicinity of the property that is the subject of the transferee's potential real estate transaction;

(2) where information about the location of convicted sex offenders can be obtained; and

(3) that they are responsible for determining whether, in the vicinity of the property that is the subject of the transferee's potential real estate transaction, there is an agricultural facility or agricultural operation that might produce odor, fumes, dust, blowing snow, smoke, burning, vibrations, noise, insects, rodents, the operation of machinery including aircraft, and other inconveniences or discomforts as a result of lawful agricultural operations.

Alaska Statute 47.10.011 provides:

Subject to AS 47.10.019, the court may find a child to be a child in need of aid if it finds by a preponderance of the evidence that the child has been subjected to any of the following:

(1) a parent or guardian has abandoned the child as described in AS 47.10.013, and the other parent is absent or has committed conduct or created conditions that cause the child to be a child in need of aid under this chapter;

(2) a parent, guardian, or custodian is incarcerated, the other parent is absent or has committed conduct or created conditions that cause the child to be a child in need of aid under this chapter, and the incarcerated parent has not made adequate arrangements for the child;

(3) a custodian with whom the child has been left is unwilling or unable to provide care, supervision, or support for the child, and the whereabouts of the parent or guardian is unknown;

(4) the child is in need of medical treatment to cure, alleviate, or prevent substantial physical harm or is in need of treatment for mental injury and the child's parent, guardian, or custodian has knowingly failed to provide the treatment;

(5) the child is habitually absent from home or refuses to accept available care and the child's conduct places the child at substantial risk of physical or mental injury;

(6) the child has suffered substantial physical harm, or there is a substantial risk that the child will suffer substantial physical harm, as a result of conduct by or conditions created by the child's parent, guardian, or custodian or by the failure of the parent, guardian, or custodian to supervise the child adequately;

(7) the child has suffered sexual abuse, or there is a substantial risk that the child will suffer sexual abuse, as a result of conduct by or conditions created by the child's parent, guardian, or custodian or by the failure of the parent, guardian, or custodian to adequately supervise the child; if a parent, guardian, or custodian has actual notice that a person has been convicted of a sex offense against a minor within the past 15 years, is registered or required to register as a sex offender

under AS 12.63, or is under investigation for a sex offense against a minor, and the parent, guardian, or custodian subsequently allows a child to be left with that person, this conduct constitutes prima facie evidence that the child is at substantial risk of being sexually abused;

(8) conduct by or conditions created by the parent, guardian, or custodian have

(A) resulted in mental injury to the child; or

(B) placed the child at substantial risk of mental injury as a result of

(i) a pattern of rejecting, terrorizing, ignoring, isolating, or corrupting be-havior that would, if continued, result in mental injury; or

(ii) exposure to conduct by a household member, as defined in AS 18.66.990, against another household member that is a crime under AS 11.41.100–11.41.220, 11.41.230(a)(1) or (2), or 11.41.410–11.41.432, an offense under a law or ordinance of another jurisdiction having elements similar to a crime under AS 11.41.100–11.41. 220, 11.41.230(a)(1) or (2), or 11.41.410–11.41.432, an attempt to commit an offense that is a crime under AS 11.41.100–11.41.220 or 11.41.410–11.41.432, or an attempt to commit an offense under a law or ordinance of another jurisdiction having elements similar to a crime under AS 11.41.100–11.41.220 or 11.41.410-11.41.432; or

(iii) repeated exposure to conduct by a household member, as defined in AS 18.66.990, against another household member that is a crime under AS 11. 41.230(a)(3) or 11.41.250–11. 41.270 or an offense under a law or ordinance of another jurisdiction having elements similar to a crime under AS 11.41. 230(a)(3) or 11.41.250–11.41.270;

(9) conduct by or conditions created by the parent, guardian, or custodian have subjected the child or another child in the same household to neglect;

(10) the parent, guardian, or custodian's ability to parent has been substantially impaired by the addictive or habitual use of an intoxicant, and the addictive or habitual use of the intoxicant has resulted in a substantial risk of harm to the child; if a court has previously found that a child is a child in need of aid under this paragraph, the resumption of use of an intoxicant by a parent, guardian, or custodian within one year after rehabilitation is prima facie evidence that the ability to parent is substantially impaired and the addictive or habitual use of the intoxicant has resulted in a substantial risk of harm to the child as described in this paragraph;

(11) the parent, guardian, or custodian has a mental illness, serious emotional disturbance, or mental deficiency of a nature and duration that places the child at substantial risk of physical harm or mental injury;

(12) the child has committed an illegal act as a result of pressure, guidance, or approval from the child's parent, guardian, or custodian.

Supreme Court Rule 10 provides:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a de parture by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court Rule 15.2 provides:

A brief in opposition should be stated briefly and in plain terms and may not exceed the page limitations specified in Rule 33. In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that

bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

(4)

SEP 8 - 2004

No. 03-1652

In The
Supreme Court of the United States

JOHN DOE I, JANE DOE, and JOHN DOE II,

Petitioners,

v.

BILL TANDESKE, Commissioner of the State of Alaska Department of Public Safety and GREGG RENKES, Attorney General of the State of Alaska,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' OPTIONAL REPLY BRIEF SUPREME COURT RULE 15(6)

DARRYL L. THOMPSON
Counsel of Record
DARRYL L. THOMPSON, P.C.
841 I Street
Anchorage, Alaska 99501
Ph: (907) 272-9322
Fax: (907) 277-1373

VERNE E. RUPRIGHT
Counsel for John Doe II
RUPRIGHT & FOSTER, LLC
322 Main Street
Wasilla, Alaska 99654
Ph: (907) 373-3215
Fax: (907) 373-3217

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Alaska's sex offender registration act, Alaska Stat. § 12.63.010 *et seq.*, requires persons long ago convicted, released and reintegrated to register with the authorities for life and to have personal and private information disseminated to the public. The private information disseminated to the public is not limited to private information belonging to the registrant, but included information belonging to members of the registrant's family. Does the Act, as applied to petitioners, violate the substantive component of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONERS 1

There are no misstatements in petitioners' statement of the case 1

The intervening decision warrants a GVR Order or grant of the petition 3

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Breeze v. Smith, 501 P.2d 159 (Alaska 1972) 6

Doe v. State, Department of Public Safety, 92 P.3d 398 (Alaska 2004) ..... *passim*

Doe v. Otte, 259 F.3d 979 (9th Cir. 2001) 4

Doe v. Tandeske, 361 F.3d 594 (9th Cir. 2004) 4, 5

Hewitt v. Helms, 459 U.S. 460 (1983) 4

Moore v. Illinois C. R. Co., 312 U.S. 630 (1941) 5

Olim v. Wakinekona, 461 U.S. 238 (1983) 4

Patterson v. State, 985 P.2d 1007 (Alaska 1999) 6

Smith v. Doe, 538 U.S. 84 (2003) 5

State v. Guidry, ___ P.3d ___, 2004 Haw. LEXIS 540 (Hawaii, August 6, 2004) 6

REPLY BRIEF FOR PETITIONERS

There are no misstatements in petitioners' statement of the case.

Respondents erroneously contend petitioners made numerous misstatements in the petition, which they are compelled to correct. [Opp. 7-11].

Petitioners have not mischaracterized the Alaska legislature's motive, or erroneously asserted that the ASORA labels the registrant. [Opp. 7-8]. *See Doe v. State, Department of Public Safety*, 92 P.3d 398, 407-411 (Alaska 2004).

Respondents are wrong to contend that petitioners cite certain statutory provisions for the first time. *Id.* Those same statutory provisions, with the exception of *Ak. Stat. 44.41.035(b)(5)* [Pet. App. 21a] were cited to this Court in *Smith v. Doe*, 538 U.S. 84 (2003). [*Brief of Respondents*, p. 5, fn. 3, Docket No. 01-179]. Section 44.41.035(b)(5) was cited for the first time before the Court of Appeals on remand because it was added as a consequence of the ASORA after this Court's decision in *Smith v. Doe*. [Pet. App. 26a, *citing § 13, ch. 88, SLA 2003*].

The ASORA does in fact require petitioners to gather, collate and deliver information to the State, and it does require release of mental health information. [Opp. 9-10]. *Doe v. State, Department of Public Safety*, 92 P.3d at 408-411. Indeed, *Ak. Stat. 12.63.010(b)(1)(H)* requires release of mental health information and respondents have exceedingly broad discretion in deciding how to verify information, which would include compelling production of those mental health records. [Pet. App. 9a-9b]; *Ak. Stat. 18.65.087(f)*; [Pet. App. 20a]. It just would not make sense to require mental health information and then not allow

the State to follow up and request more information should mental abnormalities be reported by a registrant.

The only misstatements before this Court are those of respondents regarding the importance and the effect of the intervening decision by the Alaska Supreme Court in *Doe v. State, Department of Public Safety*, 92 P.3d 398 (Alaska 2004). Petitioners correctly show that *Doe v. State, Department of Public Safety* has so changed the legal landscape that an injustice would result if the Court of Appeals decision were allowed to stand without allowing reconsideration based on this intervening change in the law. In light of this intervening decision, there is a conflict between the Alaska Supreme Court's interpretation of State law and this Court's interpretation. Under Rule 10(a) of this Court's Rules, that is grounds for granting a petition for writ of certiorari. In light of this conflict, a GVR Order is the appropriate remedy, which would allow the Court of Appeals to reconsider its decision in light of the intervening change in the law. Alternatively, grant of the petition and ordering a briefing schedule is minimally required so the degree to which the Alaska Supreme Court's decision changes the legal landscape can be adequately briefed and addressed by this Court. Respondents attempt to minimize this conflict by grossly understating the importance of the Alaska Supreme Court's decision, and by relying on an Alaska Court of Appeals decision that has been overruled. [Opp. 23]; *Doe v. State, Department of Public Safety*, 92 P.3d at 411. Their position in this regard, while artfully crafted, lacks any appreciable merit.

The intervening decision warrants a GVR Order or grant of the petition.

On remand from this Court, petitioners reargued their as applied challenge, contending the ASORA violated both the procedural and substantive component of the Due Process Clause of the 14th Amendment. [Pet. App. 1a-4a]. In deciding against petitioners, the Court of Appeals for the Ninth Circuit did not have an opportunity to consider the effect or importance of the Alaska Supreme Court's decision in *Doe v. State, Department of Public Safety*, 92 P.3d 398 (Alaska 2004), where the Alaska Supreme Court held that, as applied to persons whose conviction had been set aside, or who had demonstrated excellent prospects for rehabilitation and who were not a risk to the public, the ASORA violated due process. *Id.* [Pet. App. 1a-4a].

In reaching its conclusions, the Alaska Supreme Court held, in part, that there was no legitimate reason to support the belief that Doe posed a public danger and thus, the State's interference with his liberty interests was unjustified. *Doe v. State, Department of Public Safety*, 92 P.3d at 412. The Court further held that "absent the likelihood Doe will commit new sex offenses, there is no compelling government interest in requiring Doe to do the things ASORA demands." *Id.* The holding in *Doe v. State, Department of Public Safety*, is premised on the fact that the set aside order demonstrates the recipient is rehabilitated and no longer dangerous and thus there is no compelling need to require that particular individual to register. *Id.* The finding of "no compelling need" clearly demonstrates that the Alaska Supreme Court found that certain fundamental rights (e.g., the right to be let alone) were abrogated by the registration requirement, and thus, the Court of Appeals for the Ninth Circuit applied the

wrong standard to determine whether the ASORA violated the Does' due process rights. *Doe v. Tandeske*, 361 F.3d 594 (9th Cir. 2004). Rather than apply strict scrutiny, the Court of Appeals applied the reasonable relationship test. *Id.* The Alaska Supreme Court's decision requires a finding, at a minimum, that important state granted fundamental rights are abrogated and these liberty interests are protected by 14th Amendment Due Process. *Hewitt v. Helms*, 459 U.S. 460, 466, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983); *Olim v. Wakinekona*, 461 U.S. 238, 249, 75 L. Ed. 2d 813, 103 S. Ct. 1741 (1983).

In the instant case, John Doe I demonstrated that he does not pose a public danger and there is no evidence that John Doe II presently poses a threat to public safety. *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001). John Doe I had two separate, judicial determinations regarding his prospect for rehabilitation and the lack of threat to public safety. The first was when the sentencing court modified his sentence due to his excellent prospect for rehabilitation, and the second was when the Alaska Superior Court granted his request for custody of his daughter. *See Doe v. Otte*, 259 F.3d at 982. Moreover, the record will reflect that the State Board of Parole released John Doe I early, citing his rehabilitation and low threat to public safety. The question then is whether the ASORA, as applied, to John Doe I or John Doe II violates their due process rights. Although the Court of Appeals decided that question in the negative, it did so based on this Court's interpretation of a State law, and not based on the Alaska Supreme Court's interpretation of that same law. [Pet. App. 4a].

In deciding the ASORA did not violate the Does' due process rights, the Court of Appeals applied this Court's

interpretation of the ASORA as set out in *Smith v. Doe*, 538 U.S. 84 (2003). [Pet. App. 4a]. That interpretation has now proved to be erroneous, because the ill effects of the law do not flow from the conviction; rather they flow from the Act itself. *Doe v. State, Department of Public Safety*, 92 P.3d at 408-411. As set out in petitioners' supplemental brief to this Court, the Alaska Supreme Court's interpretation of State law differs significantly from this Court's interpretation, and both this Court and the Court of Appeals are now bound by the Alaska Supreme Court's interpretation, even if it is contrary to this Court's interpretation as expressed in *Smith v. Doe*. *See Moore v. Illinois C. R. Co.*, 312 U.S. 630, 633-34 (1941). Notwithstanding respondents' well crafted legal argument [Opp. 11-24], the respondents overlook some indisputable truths.

First, the Alaska Supreme Court's interpretation of the ASORA differed substantially from the interpretation applied by this Court in *Smith v. Doe*, 538 U.S. 84 (2003), and applied by the Court of Appeals for the Ninth Circuit when it held that it was bound by *Smith v. Doe*. *Doe v. Tandeske*, 361 F.3d 594 (9th Cir. 2004). This differing interpretation creates the type of conflict required for granting a writ of certiorari under this Court's Rule 10(a).

Second, the Court of Appeals for the Ninth Circuit is now bound by the Alaska Supreme Court's interpretation of the ASORA, and not by this Court's interpretation in *Smith v. Doe*.

Third, the Court of Appeals held that the ASORA did not infringe on fundamental liberties, and thus strict scrutiny did not apply; rather the respondents only needed to show a reasonable relationship to a legitimate governmental interest.

Fourth, the Alaska Supreme Court held the ASORA does infringe on fundamental liberties and strict scrutiny did apply – the government must show a compelling need and that the means employed must be the least restrictive means available to achieve the government's goal. One fundamental liberty infringed was the right to be let alone, which, in Alaska, is the same as the federal right to be let alone. *See Breeze v. Smith*, 501 P.2d 159, 168 (Alaska 1972); *Doe v. State, Department of Public Safety*, 92 P.3d at 408.

Fifth, the authority relied upon by the respondents is not controlling. [Opp. 23, *citing Patterson v. State*, 985 P.2d 1007 (Alaska 1999)]. Contrary to respondents' misstatement, *Patterson* was overruled by the Alaska Supreme Court in *Doe v. State, Department of Public Safety*, 92 P.3d at 411. Respondents' argument to the contrary, other State's have held that sex offender registration requirements violate due process. *See State v. Guidry*, ___ P.3d ___, 2004 Haw. LEXIS 540 (Hawaii, August 6, 2004).

Justice requires that the Court of Appeals must be given the opportunity to reconsider its decision in light of the intervening decision by the Alaska Supreme Court. The meaning of the Alaska Supreme Court's decision and its effect on the petitioners' case should be decided there in the first instance[1], so the issues are well briefed and

[1] Allowing the Court of Appeals to interpret the meaning and effect of the Alaska Supreme Court's decision in *Doe v. State, Department of Public Safety* makes sense because the numerous questions that arise in light of the conflict between the Alaska Supreme Court's interpretation of the ASORA and this Court's interpretation can best be resolved before the Court of Appeals in the first instance. As an example, if there is a need for clarification, the Court of Appeals can certify questions to the Alaska Supreme Court under Alaska Appellate Rule 407.

"fleshed out" before this Court is faced with those questions. That being so, this Court should issue a GVR (Grant Vacate & Remand) Order, so the Ninth Circuit can reconsider its decision in light of the Alaska Supreme Court's interpretation of the ASORA.

CONCLUSION

The petition for writ of certiorari should be granted, the Court of Appeals decision should be vacated, and this case should be remanded for reconsideration in light of the Alaska Supreme Court's decision in *Doe v. State, Department of Public Safety.* Alternatively, the petition should be granted and a briefing schedule should issue.

Respectfully submitted:

DARRYL L. THOMPSON
Counsel of Record
DARRYL L. THOMPSON, P.C.
841 I Street
Anchorage, Alaska 99501
Ph: (907) 272-9322
Fax: (907) 277-1373

VERNE E. RUPRIGHT
Counsel for John Doe II
RUPRIGHT & FOSTER, LLC
322 Main Street
Wasilla, Alaska 99654
Ph: (907) 373-3215
Fax: (907) 373-3217

No. 03-1652

Supreme Court, U.S.
FILED
JUN 24 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOHN DOE I, JANE DOE, and JOHN DOE II,

Petitioners,

v.

BILL TANDESKE, Commissioner of the State of Alaska Department of Public Safety and GREGG RENKES, Attorney General of the State of Alaska,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

DARRYL L. THOMPSON
Counsel of Record
841 I Street
Anchorage, Alaska 99501
Ph: (907) 272-9322
Fax: (907) 277-1373

VERNE E. RUPRIGHT
Counsel for John Doe II
RUPRIGHT & FOSTER, LLC
322 Main Street
Wasilla, Alaska 99654
Ph: (907) 373-3215
Fax: (907) 373-3217

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Alaska's Sex Offender Registration Act, Alaska Stat. § 12.63.010 *et seq.*, requires persons long ago convicted, released and reintegrated to register with the authorities for life and to have personal and private information disseminated to the public. The private information disseminated to the public is not limited to private information belonging to the registrant, but included information belonging to members of the registrant's family. Does the Act, as applied to petitioners, violate the substantive component of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS

Page

Question Presented i

Supplemental Authority 1

Conclusion 4

Supplemental Appendix:

Alaska Supreme Court Decision 36a-70a

TABLE OF AUTHORITIES

FEDERAL CASES:

Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co., 520 U.S. 893 (1997) 1

Robinson & Co. v. Belt, 187 U.S. 41 (1902) 1

Smith v. Doe, 538 U.S. 84 (2003) 2, 3

STATE CASES

Doe v. State Dept. of Public Safety, ___ P.3d ___, Slip Opinion No. 5815 (Alaska, June 11, 2004) 1, 2, 36a

SUPPLEMENTAL AUTHORITY

This supplemental brief is filed pursuant to Rule 15(8) of the Rules of the Supreme Court of the United States because one day after the petition for writ of certiorari was filed in the instant case, the Alaska Supreme Court issued its decision in *Doe*[1] *v. State Dept. of Public Safety*, ___ P.3d ___, Slip Opinion No. 5815 (Alaska, June 11, 2004). (App. 36a). This opinion presents the interpretation of the Alaska Sex Offender Registration Act ("ASORA") as interpreted by the State's highest court, and an interpretation to which this Court is bound. *Robinson & Co. v. Belt*, 187 U.S. 41, 46 (1902). Because the Alaska Supreme Court's interpretation of the ASORA differs considerably from this Court's interpretation as expressed in *Smith v. Doe*, 538 U.S. 84 (2003), the Alaska Supreme Court's decision supports the petitioners' request for a writ of certiorari. Alternatively, because the Court of Appeals for the Ninth Circuit did not have the benefit of the Alaska Supreme Court's interpretation when it decided this case on substantive due process grounds, a GVR order should issue so the Court of Appeals can reconsider its opinion in light of the Alaska Supreme Court's interpretation of the ASORA. *Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 896 (1997) (where there has been an intervening decision from the State's highest court, and the Court of Appeals did not have the benefit of that decision, this Court may grant the petition, vacate the Court of Appeals decision and remand for reconsideration (a GVR order)).

---

[1] This is not the same Doe that is party to the instant case.

The Alaska Supreme Court's decision in *Doe v. State Dept. of Public Safety* casts doubt on the soundness of the Court of Appeals decision. In fact, the Alaska Supreme Court's decision casts doubt on the soundness of this Court's decision in *Smith v. Doe*. This is so, because the Alaska Supreme Court's interpretation as to the construction and effect of the ASORA differs considerably from the interpretation as to construction and effect expressed by the Court of Appeals and by this Court.

This Court determined that viewing the information on the internet was the same as going to a public archive and researching the information. 538 U.S. at 99. In other words, the information is already public. *Id.* The Alaska Supreme Court has interpreted the ASORA and other Alaska provisions and concluded that the ASORA requires release of information that is not public. (App. 59a-60a).

This Court interpreted the ASORA and concluded it does not impose an affirmative disability or restraint. 538 U.S. at 100. The Alaska Supreme Court interpreted the ASORA and concluded the ASORA has very significant and direct consequences not generally associated with a conviction. (App. 54a-60a). These effects of the ASORA arise from four features of the Act and not from the conviction itself. *Id.*

This Court held that, although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow, not from the Act's registration and dissemination provisions, but from the fact of conviction. *Smith v. Doe*, 538 U.S. at 101. The Alaska Supreme Court held that destructive consequences flow from the fact of registration and public notification and not from the fact of conviction. (App. 63a).

This Court also held that all the State does is make the facts underlying the offenses and the resulting convictions more accessible so members of the public can take the precautions they deem necessary before dealing with the registrant. *Id.* The Alaska Supreme Court held that there is a significant difference between a public record that continues to memorialize a conviction and a state-sponsored internet site that displays information required to be produced by the registrant. (App. 62a). The difference, according to the Alaska Supreme Court, is not that the State has merely improved public access to public information but that the ASORA requires registrants to provide considerable information that was not in the public record as a result of the conviction. *Id.*

This Court held that a registrant is not under an affirmative disability or restraint because he did not have to report in person to the police. 538 U.S. at 101. The Alaska Supreme Court found an affirmative disability or restraint because the registrants, unlike other free citizens, are required to contact the police on a regular basis, in some cases, for the rest of their lives. (App. 61a-62a).

This Court concluded it was pure conjecture on the part of the Court of Appeals that the ASORA imposed harm by interfering with employment, housing, and with the right to be let alone. 538 U.S. at 100. The Alaska Supreme Court concluded that there was more than sufficient evidence that this was not conjecture, but fact. (App. 63a-65a).

Although the Alaska Supreme Court's opinion was limited to persons who had their conviction set aside under Alaska's set aside statute, there are clear differences in the Alaska Court's decision regarding the construction and

effect of the ASORA. These differences highlighted herein, as well as other differences apparent from the Alaska Court's opinion, cast doubt on the soundness of the Court of Appeals decision, and should be considered by this Court when deciding whether to grant the petition for writ of certiorari and in deciding whether to issue a GVR order.

CONCLUSION

In light of the original petition, and this supplemental authority, the petition for writ of certiorari should be granted.

Respectfully submitted,

DARRYL L. THOMPSON
Counsel of Record
DARRYL L. THOMPSON, P.C.
841 I Street
Anchorage, Alaska 99501
Ph: (907) 272-9322
Fax: (907) 277-1373

VERNE E. RUPRIGHT
Counsel for John Doe II
RUPRIGHT & FOSTER, LLC
322 Main Street
Wasilla, Alaska 99654
Ph: (907) 373-3215
Fax: (907) 373-3217

Notice: This opinion is subject to correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878, e-mail corrections@appellate.courts.state.ak.us.

THE SUPREME COURT OF THE STATE OF ALASKA

JOHN DOE Appellant, v. STATE OF ALASKA, DEPARTMENT OF PUBLIC SAFETY, Appellee.	Supreme Court No. S-10338 Superior Court No. 4FA-97-2343 CI *OPINION* [No. 5815 – June 11, 2004]

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Richard D. Savell, Judge.

Appearances: Andrew Harrington, Fairbanks, for Appellant. Kenneth M. Rosenstein, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before: Fabe, Chief Justice, Matthews, Eastaugh, and Bryner, Justices. [Carpeneti, Justice, not participating.]

EASTAUGH, Justice

MATTHEWS, Justice, concurring.

I. INTRODUCTION

This appeal presents a discrete question left unanswered by the United States Supreme Court in its recent decision rejecting a constitutional challenge to Alaska's sex offender registration statute. After he was convicted of a sex offense, John Doe[1] received a suspended imposition of sentence (SIS), subject to satisfying specified conditions. When Doe's probationary period expired without imposition of sentence, the superior court set aside his conviction under authority of AS 12.55.085(e). The Alaska Sex Offender Registration Act (ASORA)[2] became effective soon after the court set aside Doe's conviction. ASORA requires persons convicted of sex offenses to register with the state and to provide and periodically update detailed personal information that the state then publishes on the Internet. We conclude that applying ASORA to a person whose conviction was set aside before ASORA became specifically applicable to convictions that were set aside violates the Alaska Constitution's guarantee of due process. We therefore remand for entry of an order enjoining the state from publishing Doe's personal information and requiring it to return all information Doe provided when he registered under protest.

II. FACTS AND PROCEEDINGS

John Doe was found guilty after a bench trial on two counts of child sexual abuse for offenses he committed in 1987. He appeared before the superior court for sentencing in 1989. The court entered an order suspending the

---

[1] "John Doe is a pseudonym

[2] AS 12.63.010-.100.

imposition of sentence, conditioned on Doe serving probation for three years, spending ninety days at a halfway house, completing 200 hours of community work service, and receiving mental health counseling. After one count was later dismissed, the superior court entered a "corrected modified order" on the remaining count in May 1991. The 1991 order again granted Doe a suspended imposition of sentence (SIS). So far as we can determine from the record, the state did not object to the 1991 SIS. In April 1994, as Doe's period of probation was expiring, the Alaska Department of Law gave the superior court written notice that the state did not oppose setting aside Doe's conviction; the superior court then entered a "discharge order." The discharge order observed that the period of probation had expired without imposition of sentence and that Doe was "entitled to be discharged" under AS 12.55.085(d) and Alaska Rule of Criminal Procedure 35.2; it consequently ordered that the "[j]udgment of conviction is hereby set aside."[3]

---

[3] AS 12.55.085 gives courts authority to suspend the imposition of sentence. At Doe's 1989 sentencing hearing, Superior Court Judge pro tem. Jane F. Kauvar, reading a passage in the presentence report to say that Doe had been offered an SIS before trial, announced an intention to consider an SIS. A 1988 amendment to AS 12.55.085 prohibited suspending the imposition of sentences of persons convicted of certain crimes, including sex offenses. Ch. 36, § 2, SLA 1988 (codified as AS 12.55.085(f)). The court reasoned that it was appropriate to give Doe an SIS because there would have been no question about Doe's eligibility for an SIS for his 1987 offense had he been sentenced earlier, before the amendment took effect. The prosecutor brought the amendment to the court's attention, but did not unequivocally argue that an SIS would be illegal. After the court granted the SIS, the prosecutor raised no objection. The state did not appeal the SIS. After Doe's probation expired in 1994, the state filed its written non-opposition to setting aside the conviction and did not argue that the 1988 amendment prevented the court from setting Doe's conviction aside.

The legislature enacted the Alaska Sex Offender Registration Act (ASORA) in May 1994.[4] ASORA became

---

[4] Ch. 41, § 4, SLA 1994 (codified as AS 12.63.010). Following amendment in 1999, ASORA defines "sex offender" as follows: "'sex offender or child kidnapper' means a person convicted of a sex offense or child kidnapping in this state or another jurisdiction regardless of whether the conviction occurred before, after, or on January 1, 1999." AS 12.63.100(5).

ASORA defines "sex offense" as follows:

(6) "sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree;

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under the following statutes or a similar law of another jurisdiction:

(i) AS 11.41.410-11.41.438;

(ii) AS 11.41.440(a)(2);

(iii) AS 11.41.450-11.41.458;

(iv) AS 11.41.460 if the indecent exposure is before a person under 16 years of age and the offender has a previous conviction for that offense;

(v) AS 11.61.125 or 11.61.127;

(vi) AS 11.66.110 or 11.66.130(a)(2) if the person who was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense; or

(Continued on following page)

effective August 10, 1994.[5] It requires sex offenders present in Alaska to register with the Alaska Department of Corrections, local police, or the Alaska State Troopers and to provide and update specified personal information.[6] The act requires the Alaska Department of Public Safety to make most of that information available to the public.[7] All fifty states and the District of Columbia have some form of sex offender registration act.[8] These statutes are commonly known as "Megan's Laws" after Megan Kanka, a seven-year-old New Jersey girl who was sexually assaulted and murdered in 1994 by a neighbor who had two prior convictions for sex offenses against children.[9]

ASORA requires each registrant to provide extensive personal information: name, address, and place of employment; the crime triggering the duty to register and the

---

(vii) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160, former AS 11.40.110, or former 11.40.200. . . .

AS 12.63.100(6).

[5] Ch. 41, SLA 1994.

[6] AS 12.63.010.

[7] AS 18.65.087.

[8] Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws,* 89 J. CRIM. L. & CRIMINOLOGY 1167, 1172 (1999). In 1994 the United States Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (1994 & 2003). This legislation obligated every state to enact a sex offender registration program at least meeting minimum guidelines specified by the United States Attorney General or forfeit ten percent of a federal funding grant for law enforcement. 42 U.S.C. § 14071(g)(2)(A).

[9] *See Smith v. Doe,* 538 U.S. 84, 89 (2003); Logan, *supra* note 8, at 1172.

date and place of the conviction; all aliases used; a description of any personal identifying features; driver's license number; a description and the license plate number and vehicle identification number of any vehicles the registrant drives or has access to; anticipated address changes; and information about any psychological treatment received.[10] Registrants must also allow themselves to be photographed and fingerprinted.[11] Registrants must update their information if it changes.[12] A registrant's fingerprints, driver's license number, anticipated address changes, and psychological treatment history are kept confidential.[13] The remaining information is made available to the general public through a central registry maintained by the Alaska Department of Public Safety and posted on the Internet.[14]

The Department of Public Safety promulgated a regulation in 1995 defining "conviction" for purposes of ASORA to include findings of guilt by a court "whether or not the judgment was thereafter set aside under AS 12.55.085."[15] In 1999 the legislature amended ASORA's statutory definition of "conviction" to include judgments that had been set aside under AS 12.55.085.[16] The state

---

[10] AS 12.63.010(b)(1)(A)-(H).

[11] AS 12.63.010(b)(2).

[12] AS 12.63.010(d)(1).

[13] AS 18.65.087(b).

[14] *See* Alaska Dept. of Public Safety, *Sex Offender Registration Central Registry*, at http://www.dps.state.ak.us/nSorcr/asp/.

[15] 13 Alaska Administrative Code (AAC) 09.900(a)(2) (1996) (am. 11/3/99).

[16] Chapter 54, section 15, SLA 1999, codified as AS 12.63.100(3), provides:

(Continued on following page)

argues that ASORA applies to Doe. We assume, per the state's assertion, that it does.

Doe did not initially register when ASORA was enacted in 1994. He registered under protest in November 1997 after a letter from the state told him that ASORA required him to register and warned him of the criminal consequences for failing to register.[17] A week after he registered, Doe filed for injunctive and declaratory relief, alleging that enforcing the registration requirement against him violated his constitutional rights and that the Department of Public Safety did not have the authority to promulgate the regulation defining "conviction" to include convictions that were set aside.[18]

Superior Court Judge Richard D. Savell granted Doe a temporary restraining order that precluded the Department of Public Safety from publicizing his registration

---

"conviction" means that an adult, or a juvenile charged as an adult under AS 47.12 or a similar procedure in another jurisdiction, has entered a plea of guilty, guilty but mentally ill, or nolo contendere, or has been found guilty or guilty but mentally ill by a court or jury, of a sex offense or child kidnapping regardless of whether the judgment was set aside under AS 12.55.085 or a similar procedure in another jurisdiction or was the subject of a pardon or other executive clemency; "conviction" does not include a judgment that has been reversed or vacated by a court.

[17] *See* AS 11.56.840 (defining failure to register under ASORA as class A misdemeanor). Class A misdemeanors are punishable by up to one year in jail and by a fine up to $10,000. *See* AS 12.55.135(a), .035(b)(5).

[18] AS 18.65.087 authorizes the department to maintain a central registry of all sex offenders required to register and to promulgate and adopt regulations necessary to effectuate ASORA's purpose. As noted above, the legislature in 1999 redefined "conviction" to include a "judgment . . . set aside under AS 12.55.085." AS 12.63.100(3) (1999).

information; the court also allowed Doe to prosecute his lawsuit under a pseudonym. The superior court ultimately granted summary judgment to Doe, ruling that the department had overstepped the scope of its authority in defining "conviction" to include convictions that had been set aside. The superior court held that the legislature did not clearly indicate its intention to include "set-asides" in ASORA's registration requirement, and that the department's inclusion of set-asides therefore exceeded the department's authority to promulgate regulations effectuating ASORA's purpose.

The Department of Public Safety appealed these rulings to this court. We ordered the appeal stayed while the Alaska Court of Appeals considered in another case whether the department had authority to adopt 13 AAC 09.900(a)(2). The court of appeals ultimately concluded in that case, *State v. Otness,* that the regulation was valid because it was "consistent with the legislative purpose to protect the public."[19]

Given the court of appeals's decision in *Otness,* we remanded the department's appeal in Doe's case to the superior court for reconsideration. Judge Savell ultimately vacated his earlier judgment, denied summary judgment to Doe, and granted summary judgment to the department. The superior court based its decision on *Otness* and *Patterson v. State.*[20] In *Patterson,* the court of appeals considered and rejected a sex offender's challenge to ASORA's constitutionality, holding that ASORA did not violate state or federal constitutional ex post facto, double

---

[19] *State v. Otness,* 986 P.2d 890, 892 (Alaska App. 1999).

[20] *Patterson v. State,* 985 P.2d 1007 (Alaska App. 1999).

jeopardy, due process, or equal protection provisions, or Alaska's constitutional guarantee of the right to privacy.[21] Applying *Patterson,* the superior court in Doe's case rejected all of Doe's constitutional claims and upheld ASORA as applied to Doe.

Doe appeals.

III. DISCUSSION

A. Standard of Review

We review de novo questions of law, including issues of statutory interpretation.[22] We apply our independent judgment in deciding whether a statute violates the Alaska Constitution.[23]

B. Decisions of the United States Supreme Court and the Ninth Circuit Rejecting Federal Challenges to the Alaska and Connecticut Sex Offender Registration Acts Do Not Resolve the Issue Presented Here.

Before discussing Doe's state constitutional arguments, we address the effect of two recent decisions of the United States Supreme Court rejecting federal constitutional challenges to the sex offender registration statutes of Alaska and Connecticut.[24] Doe's case differs from the Supreme Court's cases in an important respect: the

---

[21] *Id.* at 1011-18.

[22] *Boone v. Gipson,* 920 P.2d 746, 748 (Alaska 1996).

[23] *Todd v. State,* 917 P.2d 674, 677 (Alaska 1996).

[24] *Smith v. Doe,* 538 U.S. 84 (2003); *Connecticut Dep't of Pub. Safety v. Doe,* 538 U.S. 1 (2003).

superior court granted Doe an SIS and set aside his conviction before ASORA became effective. Those cases did not require the Supreme Court to decide the question before us: whether applying ASORA to Doe would violate his due process rights given that he satisfied the conditions of the SIS and the trial court set aside his conviction before ASORA became specifically applicable to convictions that were set aside.

Smith v. Doe resolved a federal constitutional challenge to the Alaska Sex Offender Registration Act.[25] The United States Court of Appeals for the Ninth Circuit had held that ASORA violated the ex post facto clause of the United States Constitution.[26] Holding on certiorari that it did not, the Supreme Court reversed and remanded to the Ninth Circuit for consideration of the registrant's remaining federal constitutional arguments.[27] We are not bound here by the Court's decision upholding the Alaska statute, because it decided only that ASORA did not violate the federal ex post facto clause. It did not turn on the state due process concepts that control our analysis in this appeal.

Connecticut Department of Public Safety v. Doe, decided the same day, rejected a federal procedural due process challenge to Connecticut's sex offender registration act.[28] The United States Court of Appeals for the Second Circuit had held that the Federal Constitution's guarantee

---

[25] *Smith v. Doe,* 538 U.S. 84 (2003). The "Doe" in the case now before us is not one of the two "Does" in *Smith.*

[26] *Doe v. Otte,* 259 F.3d 979 (9th Cir. 2001).

[27] *Smith,* 538 U.S. at 106.

[28] *Connecticut Dep't of Pub. Safety v. Doe,* 538 U.S. 1 (2003).

of procedural due process required Connecticut to provide a convicted sex offender with an individualized hearing on the issue of his dangerousness before requiring him to register.[29] The Supreme Court reversed, holding that the federal right of procedural due process did not require an individualized hearing on that issue.[30]

A recent Ninth Circuit decision, *Doe v. Tandeske,* also upheld ASORA against federal due process challenges.[31] *Tandeske* is the Ninth Circuit's decision on remand of *Smith v. Doe.*[32] Relying on *Connecticut Department of Public Safety,* the Ninth Circuit held that ASORA does not deprive convicted sex offenders of the federal right to procedural due process.[33] Likewise, the Ninth Circuit determined that *Smith* precluded it from concluding that ASORA violates rights to substantive due process under the Federal Constitution.[34] *Tandeske,* like *Smith* and *Connecticut Department of Public Safety,* did not address the narrow issue presented here. *Tandeske* concerned two convicted sex offenders who had served sentences of incarceration for their crimes.[35] Unlike Doe's situation, it

---

[29] *Doe v. Dep't of Pub. Safety ex rel. Lee,* 271 F.3d 38, 62 (2d Cir. 2001).

[30] *Connecticut Dep't of Pub. Safety,* 538 U.S. at 7-8.

[31] *Doe v. Tandeske,* 361 F.3d 594 (9th Cir. 2004) (per curiam).

[32] *Doe v. Otte,* 259 F.3d 979 (9th Cir. 2001), was the Ninth Circuit's first decision considering the claims of two "Doe" parties, neither of whom is the "Doe" in the case we decide today. On certiorari, the case became *Smith v. Doe,* 538 U.S. 84. On remand, the case became *Doe v. Tandeske,* 361 F.3d 594.

[33] *Tandeske,* 361 F.3d at 596 (citing *Connecticut Dep't of Pub. Safety,* 538 U.S. at 7-8).

[34] *Id.* at 597 (citing *Smith,* 538 U.S. at 102).

[35] *Doe v. Otte,* 259 F.3d at 983.

appears that the impositions of their sentences were not suspended and that their convictions had not been set aside before ASORA was enacted and became effective. Thus the case did not decide whether applying ASORA to a person whose conviction has been set aside violates due process.

C. ASORA Violates Doe's Due Process Rights Under the Alaska Constitution.

Doe advances various grounds for his contention that ASORA cannot constitutionally be applied to him. He argues that ASORA deprives him of liberty and violates the Alaska Constitution's guarantee of due process. He also argues that applying ASORA to him violates the prohibitions against ex post facto laws and double jeopardy, denies him equal protection, infringes on the doctrine of separation of powers, and interferes with the Alaska Constitution's guarantee of a right to privacy. The state contests each of these claims.

Doe contends in essence that applying ASORA to him violates his fundamental right to be free from significant, new affirmative burdens resulting from his conviction even though a court set aside that conviction before the statute was enacted. Doe's arguments encompass the grounds on which we rule and squarely raise the question of the legitimacy of the government's interference with his fundamental interests in liberty and fair procedural treatment.

State courts are not necessarily bound by the United States Supreme Court's decisions when they consider

issues of state constitutional law.[36] Only the Supreme Court's decisions on issues of federal law, including issues arising under the Federal Constitution, bind the state courts' consideration of those issues. The Alaska Supreme Court is the final authority on whether an Alaska statute violates the Alaska Constitution.[37] Doe's appeal involves Alaska's constitutional guarantee of due process. The Federal Constitution protects the due process rights of all Americans. But federal law does not preclude the Alaska Constitution from providing more rigorous protections for the due process rights of Alaskans.[38] When we interpret a provision in the Alaska Constitution, we are not bound by the United States Supreme Court's interpretation of the corresponding provision in the Federal Constitution.[39] We

---

[36] *See Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("[S]tate courts are the ultimate expositors of state law.").

[37] *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("[W]e will not review judgments of state courts that rest on adequate and independent state grounds."); *Stephan v. State*, 711 P.2d 1156, 1160 (Alaska 1985).

[38] *Stephan*, 711 P.2d at 1160 ("[W]e construe Alaska's constitutional provision . . . as affording rights beyond those guaranteed by the United States Constitution."); *Burnor v. State*, 829 P.2d 837, 839 (Alaska App. 1992).

[39] *Todd v. State*, 917 P.2d 674, 681 (Alaska 1996) ("This court is free to interpret the state constitutional provision as it sees fit, so long as the interpretation does not undermine the minimum protections established by the United States Supreme Court in decisions interpreting the federal constitution."); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280-81 (Alaska 1994) (explaining that although free exercise of religion clauses of Alaska and United States Constitutions are identical, this court is not bound by United States Supreme Court interpretation of federal free exercise clause and instead this court "may provide greater protection to the free exercise of religion under the state constitution than is now provided under the United States Constitution"); *Blue v. State*, 558 P.2d 636, 641 (Alaska 1977) ("[T]he Alaska Supreme Court is not limited by decisions of the United States Supreme Court or by the United States Constitution when

(Continued on following page)

may not undermine the minimum protections established by the United States Supreme Court's interpretations of the Federal Constitution. But we have repeatedly explained that

> we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.[40]

The Supreme Court's two recent decisions dealing with state registration statutes exclusively concerned federal constitutional challenges.

We have often recognized the importance of personal liberty under our constitution. "[A]t the core of this concept is the notion of total personal immunity from

---

interpreting its state constitution."); *Bush v. Reid*, 516 P.2d 1215, 1219-20 (Alaska 1973); *Baker v. City of Fairbanks*, 471 P.2d 386, 402 n.26 (Alaska 1970); *Roberts v. State*, 458 P.2d 340, 342 (Alaska 1969).

[40] *Baker*, 471 P.2d at 401; *see also Valley Hosp. Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 967 (Alaska 1997) ("[O]ur articulation of the protection of reproductive rights under Alaska's constitution may be broader than the minimum set by the federal constitution."); *Shagloak v. State*, 597 P.2d 142, 145 n. 14 (Alaska 1979) ("A state supreme court is not limited by the decisions of the United States Supreme Court or by the federal constitution when interpreting the provisions of the state constitution, since the latter may have broader safeguards than the minimum federal standards."); *Lemon v. State*, 514 P.2d 1151, 1154 n. 5 (Alaska 1973) (explaining that this court may adopt own interpretations of Alaska Constitution as long as it meets minimum standards set by United States Supreme Court interpretations of Federal Constitution).

governmental control."[41] The right is not absolute; its limits depend on a balance of interests that varies with the importance of the right infringed.[42] When the state encroaches on fundamental aspects of the right to liberty, it must demonstrate a compelling government interest and the absence of a less restrictive means to advance that interest.[43]

1. The meaning and effect of setting aside a conviction

Doe argues that because the superior court set aside his conviction before ASORA was enacted, the state cannot now force him to register and divulge new, private information. To evaluate his argument and the importance of the liberty interest at stake, we must consider the meaning and effect of setting aside a conviction.

When Doe was convicted, the superior court suspended the imposition of his sentence, subject to several conditions. Doe met those conditions. After Doe's probationary period expired without imposition of sentence, the superior court, with the state's consent, entered a judgment setting aside his conviction.

Alaska Statute 12.55.085 governs the suspended imposition of sentences and conviction set-asides.[44] It

---

[41] *Breese v. Smith*, 501 P.2d 159, 168 (Alaska 1972).

[42] *Sampson v. State*, 31 P.3d 88, 91 (Alaska 2001).

[43] *Id.* (citing *Valley Hosp. Ass'n*, 948 P.2d at 969; *Ravin v. State*, 537 P.2d 494, 497-98 (Alaska 1975)).

[44] AS 12.55.085(a) provides, in pertinent part:

> [I]f it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be served,

(Continued on following page)

grants a trial judge discretion to suspend, in the interest of justice, the imposition of a sentence and place the defendant on probation.[45] If the defendant satisfies the terms and conditions of the probation without incident, "the court may set aside the conviction and issue to the person a certificate to that effect."[46] Such measures are typically reserved for low-risk, first-time offenders,[47] a description the superior court found fit Doe when it suspended imposition of his sentence.[48]

> the court may, in its discretion, suspend the imposition of the sentence . . . upon the terms and conditions that the court determines, and shall place the person on probation, under the charge and supervision of the probation officer. . . .

[45] AS 12.55.085(a).

[46] AS 12.55.085(e). No known legislative history explains the origins of "set aside." Alaska Criminal Rule 35.2 implements AS 12.55.085(e).

[47] *See Wickham v. State*, 844 P.2d 1140, 1143 (Alaska App. 1993).

[48] At the 1989 SIS hearing, the superior court said:

> I feel very comfortable in saying that I think it is a minimal offense, because of the fact that even by [the victim's] worst allegation, it was a brief incident. . . . I'd say that it is mitigated by the fact that I think you are not somebody who otherwise commits offenses. . . . I think that your basic personality, of wanting to do what's right, and not wanting to do what's wrong, . . . will keep you from getting back in this position. . . . I still think that your basic personality, and your basic lack of interest . . . in little boys will keep you – I think it was situational. I really do believe . . . it happened, but I believe it was situational. I think it was at a time – one of the times in your life when you were not as stable, you were moving. You didn't have anybody you were close to at the time. You didn't have a serious relationship at that time, and I think those things have changed since when this incident happened, and I think that with the stability offered by all the people here in the back of the courtroom,

(Continued on following page)

A conviction that has been set aside is not a "conviction" in situations in which a sentence is increased or a crime is defined by a prior conviction.[49] A conviction that was set aside is not a "prior conviction" within the meaning of AS 12.55.125 and .145 (if sufficient time has elapsed), which describe the proper use of prior convictions in sentencing.[50] Moreover, a person with a conviction that was set aside has an affirmative defense in some repeat offender situations. For example, AS 11.61.200 (misconduct involving weapons in the third degree) punishes a person "who knowingly possesses a firearm capable of being concealed on one's person after having been convicted of a felony," but provides an affirmative defense to prosecution if "the underlying conviction upon which the action is based has been set aside under AS 12.55.085."[51] A conviction that was set aside may not be used to impeach a

---

> and your wife and daughter, I hope you will not be back in this situation, but I do feel at the particular time that this happened that you were not in as good a frame a mind as you are now. I think there is a high probability of successful rehabilitation, of you as a non-criminal member of society, because you've never been a particularly criminal member, other than this brief moment. As far as the necessity of isolation to prevent criminal conduct from you, I think that's fairly low. I don't think whether you are in jail or you're out of jail that there [are] kids on the street that are particularly in danger of you coming up and doing something to them.

[49] *See, e.g.*, AS 11.46.130(a)(6) (defining theft in second degree as occurring when person commits theft under AS 11.46.100 and "the value of the property is $50 or more but less than $500 and within the preceding five years the *person has been convicted and sentenced* [for another crime of theft] on two or more separate occasions in this or another jurisdiction" (emphasis added)).

[50] *Barrett v. State*, 772 P.2d 559, 575 (Alaska App. 1989).

[51] AS 11.61.200(a)(1), (b)(1)(B).

witness for having been convicted of a crime under Alaska Rule of Evidence 609(d)(2).[52]

In *State v. Mekiana* we discussed the purpose of suspending imposition of sentence and setting aside a conviction:

> Ordinarily, when a judge opts to order a suspended sentence the judge has evaluated the defendant's background and offense and decided the defendant deserves a chance to show that he or she has "reformed" and therefore should be rewarded with a clean record. One of the purposes of the set-aside statute is to provide defendants with an incentive to meet the conditions of their probation.[53]

The Alaska Court of Appeals has also considered the meaning of a set-aside under AS 12.55.085. In *Wickham v. State* it said that a set-aside order "reflect[s] a substantial showing of rehabilitation."[54] The court of appeals wrote there that "it seems virtually inconceivable that a set-aside would ever be justified in the face of substantial evidence establishing that an offender had not actually been reformed."[55] It concluded that a conviction that has been set aside cannot be used to impeach a witness at trial.[56] In his dissent in *State v. Otness,* Chief Judge Coats observed that after defendants completed conditions of suspended imposition of sentence, "they could reasonably

---

[52] *Wickham v. State,* 844 P.2d 1140, 1144 (Alaska App. 1993).

[53] *State v. Mekiana,* 726 P.2d 189, 193 (Alaska 1986).

[54] *Wickham v. State,* 844 P.2d 1140, 1144 (Alaska 1993).

[55] *Id.* at 1143.

[56] *Id.* at 1144.

conclude that their criminal conviction was part of their past, and that, if they continued to be law abiding citizens, they had a good chance of not suffering any disabilities because of this prior prosecution."[57]

But as the state observes, other decisions of this court indicate that the meaning of "set aside" is not as clear as Doe claims. We have recognized that "while the collateral consequences of a set aside conviction should be limited, records of a set aside conviction can be used in certain circumstances."[58] For example, prior convictions that were set aside may be treated as aggravating factors when sentence is imposed for a subsequent crime; AS 12.55.155(c)(8) and (c)(21) allow a sentencing judge to consider a defendant's prior criminal history.[59]

---

[57] *State v. Otness*, 986 P.2d 890, 894 (Alaska 1999) (Coats, C.J., dissenting).

[58] *Spenard Action Comm. v. Lot 3, Block 1, Evergreen Subdiv.*, 902 P.2d 766, 779 n. 23 (Alaska 1995).

[59] *See Petersen v. State*, 930 P.2d 414, 437 (Alaska App. 1996); *Larson v. State*, 688 P.2d 592, 597 (Alaska App. 1984); *see also Journey v. State*, 895 P.2d 955, 959 (Alaska 1995). AS 12.55.155 provides, in pertinent part:

> (c) The following factors shall be considered by the sentencing court and may aggravate the presumptive terms set out in AS 12.55.125:
>
> . . . .
>
> (8) the defendant's prior criminal history includes conduct involving aggravated or repeated instances of assaultive behavior.
>
> . . . .
>
> (21) the defendant has a criminal history of repeated instances of conduct violative of criminal laws, whether punishable as felonies or misdemeanors, similar in nature

(Continued on following page)

Further, we have held that setting aside a conviction does not expunge the conviction from an offender's criminal record.[60] Both the conviction and the judgment setting it aside consequently remain in the public record. Members of the public, such as potential employers inquiring into a job applicant's criminal record, can learn of the existence of a conviction that has been set aside.[61] They can do this by researching court records or by requiring a person applying for employment or housing to di[illegible]ge the fact of a prior conviction even if it has been set aside.

An offender's public record normally does not include information about events or circumstances post-dating the order granting the set-aside. The public record will normally include at least some description of the conduct that resulted in the conviction and the circumstances that justified the set-aside.[62] In our experience, the public record of an offender who receives a set-aside contains little of the information that ASORA makes public.[63]

A conviction that was set aside therefore has some lingering consequences. But these consequences are relatively limited, and are foreseeable to a set-aside candidate. They follow naturally from the original conviction and are

---

to the offense for which the defendant is being sentenced under this section.

[60] *Journey*, 895 P.2d at 959 (holding that granting set-aside does not require expunction of criminal record and noting that conviction that was set aside can be used in limited circumstances, such as to increase sentence for subsequent crime).

[61] *Id.*

[62] Any information contained in a pre-sentence report is, by rule, confidential. Alaska R. Crim. P. 32.1(b)(3).

[63] We summarized in Part II the information ASORA makes public.

not inconsistent with the findings that justify a set-aside or with the set-aside order itself.

Moreover, the offender has some ability to limit public interest in the information because it is often the offender's post-set-side elective conduct (e.g., applying for a job) that potentially requires him or her to disclose adverse information already in the public record. The defendant can limit the risk he will have to disclose this information by limiting his application choices or withdrawing applications when asked to disclose.

As we will see, the effects and consequences of ASORA are much different.

2. Liberty and procedural interests arising from the findings and Doe's set-aside

Suspending the imposition of sentence requires that there be "circumstances in mitigation of the punishment, or that the ends of justice will be served."[64] An order setting aside a conviction reflects a substantial showing of rehabilitation.[65] The superior court twice carefully considered Doe's circumstances, in 1989 and 1991, when it suspended imposition of sentence. It determined that Doe's offense was not serious and that he did not pose a risk to the community. When the superior court set aside Doe's conviction in 1994, it issued him a certificate that stated that "the defendant is discharged by the court without imposition of sentence" and that "[j]udgment of conviction is hereby set aside." The set-aside thus rewarded Doe for

---

[64] AS 12.55.085(a).

[65] *Wick[illegible] v. State*, 844 P.2d 1140, 1144 (Alaska App. 1993).

satisfying the obligations imposed on him by the superior court, based on the confirmation that he did not pose a threat of reoffending.

As Doe's opening brief cogently argues, a set-aside recipient "has already had to demonstrate that he does not fall in [the] category of high risk for a reoffense":

> The core legislative finding underlying enactment of the original Registration Act itself is that "sex offenders pose a high risk of reoffending after release from custody," section 1, ch. 41, SLA 1994. For individuals with set-asides, the court has already made a two-step longitudinal assessment of the likelihood of a reoffense. The court in making the initial determination to suspend imposition of sentence "has evaluated the individual's background and offense and decided the defendant deserves a chance to show that he or she has 'reformed' and therefore should be rewarded with a clean record." The offender, following a jail term if the court chooses to require it, is then put on probation for an extended period (in John Doe's case, nearly five years) to give the authorities ample opportunity to monitor his "risk of reoffending following release from custody." The court thus has had the chance to check the accuracy of its earlier prediction; if there has been a violation of the conditions of probation, then the conviction will not be set aside. Thus, any individual who has been given a set-aside has already had to demonstrate that he does not fall into that category of high risk for a reoffense.

(Footnotes omitted.)

Doe's set-aside was consequently founded on judicial findings that he presented no significant risk to the

community. These findings, with respect to his 1987 conduct and his conviction, were final and unchallenged. With respect to his responsibilities flowing from his conviction, they preclude subsequent reconsideration whether he posed a significant risk of committing the same offense again.

Further, the findings resulted in the superior court's entry of the set-aside order. This was a final and unappealed judicial act.

Doe's opportunity to have his conviction set aside if he satisfied the conditions the superior court imposed was a crucial element of the order suspending the imposition of his sentence. After he satisfied the conditions,[66] confirming the court's prior findings that he was unlikely to reoffend, the set-aside created a settled expectation that the state would not subsequently use the conviction that was set aside as a basis for imposing brand-new affirmative burdens on him. The now-confirmed findings and set-aside conferred on Doe a fundamental right to be let alone with respect to the conviction that was being set aside.[67]

After the court set aside his conviction, Doe no longer had the status of a convicted person.[68] There may be

---

[66] Even before Doe satisfied the conditions, a reasonable reliance interest was created by the entry of the order suspending imposition of the sentence taken together with Doe's undertaking to satisfy the conditions.

[67] *Breese*, 501 P.2d at 168.

[68] When ASORA was enacted in 1994, it did not state that it applies to persons whose convictions were set aside. The Department of Public Safety promulgated a regulation in 1995 defining "conviction" to apply to convictions that had been set aside. 13 AAC 09.900(a)(2). In 1999 the legislature amended ASORA to the same effect. Ch. 54, § 15, SLA 1999. *See supra* note 16.

unresolved questions about the full effect of setting aside a conviction. But, at a minimum, the status of a person whose conviction has been set aside differs greatly from that of a person whose conviction has not been set aside, because the set-aside recipient has now been placed in the category of persons expressly or implicitly found to pose little threat of committing new crimes.

The SIS findings and 1994 set-aside clearly give rise to interests in liberty and fair procedural treatment that merit constitutional protection.

3. ASORA's effect on Doe's liberty and procedural interests

Even though the lives of set-aside recipients may be subject to adverse, and even significant, consequences arising from the fact of their former convictions, these consequences are not inconsistent with their settled expectations and do not obviously affect their liberty interests.

In comparison, ASORA very significantly and directly affects the lives of set-aside recipients. The ways and extent it does so differ greatly from the lingering consequences a conviction that was set aside may continue to have. The effects of ASORA arise from four features of the statute. First, it imposes on offenders an affirmative duty to register with law enforcement agencies.[69] Second, it requires offenders to disclose extensive personal information, much of which the government would not otherwise

[69] AS 12.63.010.

have, and much of which is not public.[70] Third, it requires offenders to keep their information current for at least fifteen years or the rest of their lives, depending on the offense.[71] This period often exceeds both the sentences actually received by some classes of offender, and the duration of any non-custodial supervision. Fourth, it requires the state to maintain a public registry of most of the disclosed information.[72]

These features derive from the assumption that persons convicted of sex offenses pose a significant danger of committing new sex offenses.[73] This general assumption is fundamentally inconsistent with the individualized findings of fact a court makes before setting aside a particular offender's conviction. These findings are a judicial determination that the particular offender does not pose significant danger of reoffending. This determination as to a particular offender is inconsistent with treating him as if he belongs to a class that poses a danger of committing new sex offenses.

Therefore, applying ASORA to an offender whose conviction has been set aside inherently conflicts with the judicial proceedings that resulted in the set-aside. Applying ASORA to the set-aside recipient therefore also defeats the offender's settled expectations that legitimately arise from the findings and the set-aside adjudication. Moreover, applying ASORA to Doe also defeats his settled

---

[70] *Id.*

[71] AS 12.63.020.

[72] AS 18.65.087.

[73] Ch. 41, § 1, SLA 1994.

expectations because his conviction was set aside even before ASORA was enacted or became effective.

Imposing ASORA's affirmative duties on Doe effectively reclassifies his status from that of a person who received a judgment setting aside his conviction to that of a convicted offender whose conviction still stands. Offenders who are granted a set-aside order have been placed in the category of people who have been individually found by courts not to pose a danger to society. ASORA indiscriminately groups those people with persons who are presumed to pose a future danger. This general finding of dangerousness is inconsistent with the particularized case-by-case judicial findings made when individual defendants are granted SIS, before their convictions are ultimately set aside.

The burdens imposed by ASORA differ dramatically from those lingering consequences that survive a set-aside. ASORA imposes mandatory duties even if the defendant does not engage in new elective conduct. It imposes these duties because the defendant is physically present in the state, not because he has applied for employment, housing, or some government benefit. These burdens include affirmative duties to do things (register, disclose, and update information), not merely refrain from doing things (committing no new crimes). The duties are significant and intrusive, because they compel offenders to contact law enforcement agencies and register even if they have committed no new offense, and to disclose private information, much of it for public dissemination. They are also intrusive in their duration. Failure to comply exposes the

offender to criminal sanctions.[74] ASORA thus treats offenders not much differently than the state treats probationers and parolees subject to continued state supervision. In short, it treats them as though they did not satisfy their SIS conditions, as though courts did not expressly or implicitly find that they were not dangerous, as though their convictions were not set aside, and as though they had not been ordered discharged after their convictions were set aside.

There is also a significant difference between a public record that continues to memorialize a conviction after it is set aside and a state-sponsored Internet site that displays the information ASORA requires. The difference is not merely that the state has improved access to public information it had a legitimate right to gather at the time a defendant was convicted. The difference instead lies in the extent and nature of information to be divulged and the offender's duty to keep it updated. To advance ASORA's purposes effectively, the registry must include enough information to enable the public to reduce the danger registrants are assumed to pose. ASORA therefore requires a sex offender to disclose and update extensive personal information. Much of this information was not otherwise available to the public or the state when the conviction was set aside and much would not otherwise be presently available to either the public or the state. Most of the information about Doe that was to have been published in the ASORA registry was not in the public record

[74] AS 11.56.840 (defining failure to register under ASORA as class A misdemeanor). Class A misdemeanors are punishable by up to one year in jail and by a fine up to $10,000. *See* AS 12.55.135(a), .035(b)(5).

when Doe was convicted or [illegible]en the court set aside his conviction and ordered him discharged.

Because ASORA compels affirmative post-discharge conduct under threat of prosecution, because this conduct is equivalent to that often required by criminal judgments, because this sort of conduct could not be compelled absent a criminal adjudication or its equivalent, because the conviction (since set aside) is the event that triggers these duties, and because the requirement impairs one's post-set-aside freedom to be let alone, we conclude that it violates Doe's liberty interests[75] to require him to register under ASORA after the court found that Doe had satisfied the requirements of his SIS and was entitled to a set-aside, and then set aside his conviction, all before ASORA was enacted.

We also conclude that the potentially destructive practical consequences that flow from registration and widespread governmental distribution of disclosed information establish the gravity of this violation. Several sex offenders on the registry filed affidavits in support of Doe in this litigation stating that they had lost their jobs, been forced to move their residences, and received threats of violence since the establishment of the registry, even though their convictions had always been a matter of public record. Outside Alaska, there have been incidents of suicide by, and vigilantism against, offenders on state

---

[75] *See, e.g., Smith v. State, Dep't of Corr.*, 872 P.2d 1218, 1222 (Alaska 1994) (finding liberty interest in "right to be free from inappropriate conditions of parole those which unduly interfere with a parolee's personal and property rights").

registries,[76] and offenders listed on registries often have unique difficulties locating places to reside and work. Offenders are sometimes subjected to protests and group actions designed to force them out of their jobs and homes.[77] Courts have also noted these serious adverse consequences.[78]

---

[76] *See* Logan, *supra* note 8, at 1176 n.45 (citing Robert Hanley, *Shots Fired at the House of a Rapist,* N.Y. TIMES, June 17, 1998, at B1 (vigilantism); Todd S. Purdum, *Death of Sex Offender is Tied to Megan's Law,* N.Y. TIMES, July 9, 1998, at A16 (suicide); *Convicted Rapist Is Shot At,* N.Y. TIMES, July 1, 1998, at B1 (vigilantism); *Suicide is Recalled as Maine Revisits Megan's Law,* WASH. POST, Feb. 17, 1998, at A2 (suicide)).

[77] One commentator has noted several examples of this, citing:

> John T. McQuiston, *Sex Offender Is Suing His Neighbors Over Protests,* N.Y. TIMES, June 20, 1997, at B1 (describing rallies staged to protest registrant's presence, throwing of brick through his car window, and harassing calls to his employer); Lisa Sink, *Long After Release Date, Man Still Lives in Prison,* MILWAUKEE J. SENTINEL, June 1, 1999, at 1 (describing inability of registrant to find residence fifteen months after date of mandatory release); *Convicted Child Molester Loses Job,* L.A. DAILY NEWS, Jan. 16, 1997, at N10 (describing how registrant was forced from his job); *Parents Protest to Oust Molester from Community: Neighbors Collect Signatures on Petitions,* SACRAMENTO BEE, July 8, 1997, at B3 (recounting neighborhood's efforts to drive out registrant); *cf.* Henry Gottlieb, *Fighting a Local Ban on Sex Criminals,* NAT'L L.J., May 17, 1999, at A7 (discussing lawsuit filed by homeowner against homeowners' association bylaw that bars residency to registrants).

Logan, *supra* note 8, at 1176 n. 45.

[78] *Doe v. Pataki,* 120 F.3d 1263, 1279 (2d Cir. 1997) (noting registration "has had unfortunate consequences for many subject to its operation"); *E.B. v. Verniero,* 119 F.3d 1077, 1088-90 (3d Cir. 1997) (describing incidents of harassment in New Jersey, Washington, and Oregon); *Russell v. Gregoire,* 124 F.3d 1079, 1092 (9th Cir. 1997) (observing that "[n]otification may well subject offenders to humiliation, public opprobrium, ostracism, and the loss of job opportunities").

In short, we hold that applying ASORA to Doe burdens his fundamental liberty interests and right to procedural fairness arising out of the set-aside granted him in 1994, such that the state must establish a compelling governmental interest.

4. Whether the state's interest in applying the statute to pre-ASORA set-aside recipients is compelling

Having determined that application of ASORA burdens Doe's fundamental liberty and procedural interests, we must decide whether the state has demonstrated a compelling governmental interest in restricting those interests.[79] We are mindful that before a person's conviction for a sex offense can be set aside, he or she necessarily must have been convicted of that offense. When the legislature enacted ASORA, it found that "sex offenders pose a high risk of reoffending after release from custody."[80]

Because a lawfully entered set-aside order marks the termination of a formal judicial proceeding between the state and the defendant, it operates as a final judgment: it establishes the parties' mutual rights and obligations, and it binds both parties to its terms. Although a set-aside order does not erase the reality of the former conviction, or entitle the defendant to proclaim his innocence,[81] it does bar the state from using the conviction or the underlying misconduct as grounds for compelling the defendant to act

---

[79] *Sampson v. State*, 31 P.3d 88, 91 (Alaska 2001).

[80] Ch. 41, § 1, SLA 1994.

[81] *See Journey v. State*, 895 P.2d 955, 959 (Alaska 1995).

as though he remains convicted, has never been rehabilitated, and continues to pose a public danger.[82]

Once final, then, a set-aside order operates as a binding, case-specific determination that the charges underlying the conviction that was set aside no longer support an inference of public danger. A defendant who earns and receives a final set-aside order can reasonably expect that this determination will be honored by the state and given effect. A defendant who has satisfied his SIS conditions and whose conviction was set aside by a final order entered before ASORA became specifically applicable to convictions that have been set aside has an enforceable procedural right in the set-aside order's meaning and terms. The state therefore may not alter or ignore them without heeding the requirements of procedural fairness traditionally imposed on a party constrained by a judgment: prior notice, an opportunity to cross-examine and defend, and a case-specific showing of compelling circumstances warranting relief from the judgment.[83]

---

[82] Implicitly recognizing that a set-aside order reflects more on the defendant's success in complying with the rehabilitative efforts required by the conditions of his SIS than it does on his innocence of the underlying misconduct, we have held that a set-aside does not prohibit the state from allowing public access to records documenting the defendant's original conviction and underlying offense. *See Journey*, 895 P.2d at 959. Nor does a set-aside order preclude the state from considering a former conviction and the underlying conduct to be relevant information when imposing new criminal or civil sanctions for a new offense that clouds the earlier finding of rehabilitation. *See Larson v. State*, 688 P.2d 592, 597 (Alaska App. 1984) (concluding that prior conviction that was set aside does not trigger higher presumptive term for later offense, but conviction that was set aside and related facts may be considered as aggravating factors).

[83] These requirements are rooted in the constitution's due process clause and inhere in a final judgment. These requirements consequently

(Continued on following page)

There is no legitimate reason to think that Doe presents such a danger that the state's post-set-aside interference with his liberty interests is justified. Absent the likelihood Doe will commit new sex offenses, there is no compelling government interest in requiring Doe to do the things ASORA demands. Given ASORA's burden on Doe's liberty interests and its interference with his settled expectations, we conclude that the Alaska Constitution's guarantee of due process prevents the state from contradicting the judgment of the superior court and requiring Doe to satisfy ASORA.

Because we decide that applying ASORA to Doe violates his due process rights, we do not reach Doe's other arguments.[84]

---

limit state action with respect to the subject of that judgment regardless of whether the state acts through its executive or legislative branch. We recognize that the legislature has broad authority to take *prospective* action redefining the availability and effects of SISs and set-aside orders. But Doe's SIS conviction and set-side order both predated the date when ASORA became specifically applicable to convictions that were set aside. It is therefore not necessary to decide in this case whether these requirements would apply to an offender who was granted an SIS conviction before that date, but whose conviction was set aside after that date. We express no view on this issue. To the extent that *Patterson v. State*, 985 P.2d 1007, 1017 (Alaska App. 1999), is inconsistent with our holding here or might be read as resolving the issue we leave open above, it is overruled.

Because Doe's conviction and set-aside order both predated the effective dates of both the 1995 regulation and the 1999 amendment which redefined "conviction" to include convictions that were set aside, it is not necessary in this case to consider whether the regulation was valid.

[84] We limit our holding to set-aside recipients whose SISs were entered under AS 12.55.085 or statutes of other jurisdictions whose provisions also require a substantial showing of rehabilitation. *See Wickham v. State*, 844 P.2d 1140 (Alaska App. 1993) (noting federal

(Continued on following page)

IV. CONCLUSION

Because applying ASORA to a person whose conviction was set aside under AS 12.55.085 before ASORA became specifically applicable to convictions that were set aside unconstitutionally interferes with the individual's liberty interests and because the state has failed to establish that this application is justified by a compelling governmental interest, we REVERSE the judgment that upheld ASORA as applied to Doe and REMAND for entry of an order enjoining the state from publishing Doe's registration information and requiring the state to return all information Doe provided when he registered under protest.

MATTHEWS, Justice, concurring.

My primary reasons for reversing the decision of the superior court can be summarized as follows. The SIS program offers a promise to participating defendants that in most respects they will not be treated as convicted criminals. Defendants can accept this offer by complying with the conditions imposed by the program. When so accepted, the program creates a legally protected interest. The ASORA registration requirement treats those who have had their convictions set aside under the program as convicted criminals, and does so in a particularly invasive and socially and economically disabling way. It thus substantially breaches the bargain implicit in the SIS program. This is fundamentally unfair and violates the

---

cases applying Federal Rule of Evidence 609(c) that turn on whether state's set-aside procedures require affirmative finding of defendant's rehabilitation).

state constitutional guarantee of due process. The opinion of the court encompasses this rationale and I join in it.

It seems useful to discuss briefly the issue of the time parameters of the cases to which this rationale applies. Clearly it does not apply to judgments suspending the imposition of sentences entered after ASORA was explicitly made applicable to convictions set aside under the SIS program.[1] The defendants in this category have notice when they begin to participate in the program that they will not be exempt from registration. There is thus no breach of a state promise and no special element of unfairness. Just as clearly, cases in which set-asides occurred before ASORA was explicitly made applicable to SIS cases should be held to be exempt from registration. In such cases defendants gave full performance in reliance on the state's promise, and a set-aside was entered. I believe that this rationale also should apply to cases where defendants have fully or substantially performed the conditions imposed on them by the program before ASORA was made applicable to SIS cases, even if the set-aside order was entered after that time. The important thing in such cases is that the defendants have acted with the justified expectation that in most respects they will be treated as though they were never convicted. It would be as unfair to apply ASORA to them as to defendants whose convictions were set aside before ASORA was made applicable to SIS cases. A similar rationale might apply where a guilty or nolo plea

[1] ASORA was first made applicable to SIS convictions by a regulation promulgated in 1995. The effective date of this regulation thus will be the critical date governing the application of the precedent established by the opinion of the court assuming the regulation was authorized and validly promulgated

was entered as a plea bargain contemplating the use of the SIS program. If such a plea were entered before ASORA applied to SIS cases, the detrimental reliance inherent in the plea could be sufficient to support an exemption from registration even if much of the probation were served after ASORA applied. Many of the views expressed in this paragraph are not encompassed in the opinion of the court. I discuss them only because they may be of some use in defining and deciding issues that will arise as to how to apply the precedent that is established today.